

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF OHIO  
 EASTERN DIVISION

- - -

JOCELYN TOMPKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV. ACTION
	)	5:94-CV-1302
THE AMERICAN TOBACCO COMPANY,	)	
et al,	)	
	)	
Defendants.	)	

- - -

DEPOSITION OF MICHAEL M. SHERRY, M. D.

THURSDAY, JUNE 28, 2001

- - -

The deposition of DR. MICHAEL M. SHERRY,  
 called as a witness, pursuant to notice and the  
 Pennsylvania Rules of Civil Procedure, held at  
 Courtyard Pittsburgh, 450 Cherrington Parkway,  
 Coraopolis, PA 15108, commencing at 4:05 o'clock  
 PM, on the day and date above set forth.

- - -

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APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

A. RUSSELL SMITH, ESQUIRE (By Conference Call)  
 A. BRYAN NACE, ESQUIRE (By Conference Call)  
 A. Russell Smith Law Offices  
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 159 S. Main Street  
 Akron, Ohio 44308

ON BEHALF OF THE DEFENDANTS LORILLARD AND PHILIP  
 MORRIS:

8 DONALD J. KEMNA, ESQUIRE  
BERNARD V. O'NEILL, ESQUIRE  
9 Shook, Hardy & Bacon, LLP  
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Kansas City, Missouri 64105

11  
ON BEHALF OF THE DEFENDANT LORILLARD:

12 PATRICK M. McLAUGHLIN, ESQUIRE  
13 McLaughlin & McCaffrey, LLP  
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ON BEHALF OF THE DEFENDANT AMERICAN TOBACCO:

16 BENJAMIN S. SHIVELY, ESQUIRE (By Conference  
17 Call)  
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18 2500 Brown & Williamson Tower  
Louisville, KY 40202-3410

19  
ON BEHALF OF LIGGETT:

20 COLLEEN HAMMERHAND, ESQUIRE (By Conference  
21 Call)

22

23 - - -

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1 I-N-D-E-X

2 EXAMINATION:

3 By Mr. Smith: Page 4

4 - - -

5 E-X-H-I-B-I-T-S

6 Sherry Deposition Exhibit 1 - Page 5  
7 Sherry Deposition Exhibit 2 - Page 21  
8 Sherry Deposition Exhibit 3 - Page 21  
9 Sherry Deposition Exhibit 4 - Page 21  
10 Sherry Deposition Exhibit 5 - Page 21  
11 Sherry Deposition Exhibit 6 - Page 28  
12 Sherry Deposition Exhibit 7 - Page 28  
13 Sherry Deposition Exhibit 8 - Page 28  
14 Sherry Deposition Exhibit 9 - Page 28  
15 Sherry Deposition Exhibit 10 - Page 31

16 Sherry Deposition Exhibit 11 - Page 37

17 Sherry Deposition Exhibit 12 - Page 37

18 Sherry Deposition Exhibit 13 - Page 37

19 - - -

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1 MICHAEL M. SHERRY, M. D.

2 called as a witness, having been first duly sworn,

3 as hereinafter certified, was examined and

4 testified as follows:

5 EXAMINATION

6 BY MR. SMITH:

7 Q Will you state your name, please, sir?

8 A Michael Sherry.

9 Q And your address, residence and  
10 business, please?

11 A [DELETED]

12

13 424 Broad Street, Sewickley Hospital,  
14 15143. Suite 424, Sewickley Hospital, Broad  
15 Street, Sewickley, PA.

16 Q Is that Sewickley Valley Hospital?

17 A Yep.

18 Q And your home is in [DELETED]?

19 A Yep.

20 Q Would you tell us, please -- well,  
21 withdraw that.

22 MR. SMITH: Mary Ellen, would you please

23 mark the notice for depo, if one of the people

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5

1 there would be kind enough to provide you with

2 one?

3 (Whereupon, the document was marked as

4 Sherry Deposition Exhibit 1 for

5 identification.)

6 BY MR. SMITH:

7 Q Dr. Sherry, would you tell us, please,

8 what you brought with you today?

9 A I have got a black folder of the  
10 records.

11 I have three textbooks entitled  
12 DeVita --

13 Q What was the last?

14 A DeVita, written by DeVita.

15 Q Your curriculum vitae?

16 A No, no. It's -- do you need the -- do  
17 you want the books, their titles?

18 Q Okay. The names of the books. I'll  
19 catch up with you.

20 A Cancer --

21 Q We will come back to that in a minute,  
22 the names of them.

23 A Okay. I have got three textbooks, a

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6

1 book I wrote, and then 15 files of records  
2 pertaining to the case.

3 Q Dr. Sherry, when you say "files of  
4 records," do you mean of the medical records of the  
5 plaintiff, of the plaintiff decedent --

6 MR. O'NEILL: No. They are Reliance

7 materials.

8 A Reliance --

9 Q -- David Tompkin's medical records --

10 A Reliance records.

11 Q -- or do you mean medical articles?

12 A Medical articles.

13 Q And I am guessing that you have those in

14 an Expandex folder, numbered --

15 A I have got them --

16 Q -- or are they loose?

17 A -- a couple numbered, and a couple in my

18 hand --

19 Q Okay.

20 A -- and then I have some expert witness's

21 reports.

22 MR. SMITH: Why don't we take time to

23 -- let's mark everything but the books first,

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7

1 if we could, and I will wait for you to mark

2 them, Mary Ellen.

3 MR. KEMNA: Russ, just for

4 clarification, do you want every individual

5 item separately marked?

6 MR. SMITH: How many of them are there,

7 approximately?

8 MR. KEMNA: There are quite a few, and

9 just to help you out on this, it is a mixture

10 of a couple of articles from the literature,

11 a variety of the expert reports that are

12 actually part of this case, and a mixture of

13 maybe a few other items, but you are going to

14 be talking about -- I don't know -- is it  
15 roughly 15 different items --  
16 THE WITNESS: Uh-huh.  
17 MR. KEMNA: -- separated by particular  
18 manila folders within a redwell folder.  
19 MR. SMITH: Are they -- they each have a  
20 numbering to the packets of the redwell  
21 folder?  
22 MR. KEMNA: The manila folders I think  
23 have some kind of a letter or number  
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1 designation on them, don't they? 8  
2 THE WITNESS: Yes. There's 17 of them.  
3 MR. KEMNA: Okay.  
4 THE WITNESS: We can go over them. No  
5 problem.  
6 MR. KEMNA: Okay. Do you want to walk  
7 through them, Russ, and have them marked, or  
8 do you just want them sequentially marked now?  
9 MR. SMITH: Why don't -- are they in  
10 any way coordinated with, or are any of them  
11 coordinated with the eighteen items on the  
12 Reliance materials that I have been provided?  
13 MR. KEMNA: Certainly a number of them  
14 are consistent with the Reliance list. I'm  
15 not sure.  
16 Are they --  
17 MR. O'NEILL: Yes.  
18 MR. KEMNA: They are organized, I guess,  
19 according to the Reliance materials list, I  
20 have been told.  
21 MR. SMITH: There's eighteen of them?

22 THE WITNESS: Seventeen.

23 MR. KEMNA: Seventeen numbered items.

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1 MR. SMITH: Which one dropped out? Can

2 you tell?

3 MR. KEMNA: Well, first of all, there

4 are a couple of textbooks which you said you

5 did not want to mark at this point, and I will

6 tell you, at this point they are here for

7 purposes of completeness, but Dr. Sherry does

8 expect to take these books back to his office,

9 and certain of those books are part of the

10 numbered items on the Reliance material list,

11 so there is not a perfect fit here in terms of

12 the numbering of the Reliance material list

13 and the numbering of the file folders.

14 MR. SMITH: Do you have, item one on

15 your Reliance materials are the medical

16 records of David Tompkin?

17 MR. KEMNA: Yes. There is a -- there is

18 a black binder here with medical records in it

19 regarding David Tompkin.

20 MR. SMITH: Does that contain all of the

21 medical records?

22 MR. KEMNA: Well, at this point I will

23 let Dr. Sherry respond.

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10

1 THE WITNESS: Yes, I think that's fair.

2 MR. SMITH: Pardon?

3 THE WITNESS: Yes, the black thing.

4 MR. KEMNA: I will tell you what, Russ.

5 If you want a little help from me, I can walk  
6 through the numbered file folders and describe  
7 what is in them sequentially.

8 Do you want to do that?

9 MR. SMITH: Yes. I'll tell you, that's  
10 okay.

11 Go ahead. Let's start down that way,  
12 anyway.

13 MR. KEMNA: All right. We have a  
14 manila folder marked Number 1. It's the  
15 original complaint in the case.

16 MR. SMITH: Okay.

17 MR. KEMNA: Number 2 is the Plaintiff's  
18 Second Amended Complaint.

19 MR. SMITH: Okay.

20 MR. KEMNA: Number 3 is the Plaintiff's  
21 Third Amended Complaint.

22 MR. SMITH: Okay.

23 MR. KEMNA: Number 4 is the deposition

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11

1 of David Tompkin dated November 8, 1994.

2 MR. SMITH: Okay.

3 MR. KEMNA: Number 5 is the deposition  
4 of David Tompkin dated Friday, November 18,  
5 1994.

6 MR. SMITH: Okay.

7 MR. KEMNA: Number 6 is the deposition  
8 of Jocelyn Ann Tompkin dated June 14, 1995.

9 MR. SMITH: Okay.

10 MR. KEMNA: Number 7 is the letter from  
11 Dr. Andrew Hass dated October 14, 1997.

12 MR. SMITH: Okay.



13 MR. KEMNA: Number 8 is the deposition  
14 of Andrew J. Hass dated December 19, 1997.  
15 MR. SMITH: Okay.  
16 (Telephone signaled.)  
17 MR. KEMNA: Number 9 is the letter  
18 report from Dr. Tomashefski dated October 20,  
19 1997, with the autopsy report attached.  
20 MR. McLAUGHLIN: Don, excuse me. Did  
21 somebody just join the deposition?  
22 MR. SHIVELY: Two people did. That was  
23 me, Ben Shively.  
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12  
1 MR. SMITH: Now, Ben, you are appearing  
2 on behalf of whom?  
3 MR. SHIVELY: American Tobacco.  
4 MR. SMITH: Did somebody else join?  
5 MR. NACE: This is Bryan Nace. I am  
6 here, also. I just joined.  
7 MR. SMITH: Okay. Did anybody else  
8 join?  
9 (No response.)  
10 MR. McLAUGHLIN: Okay. I just wanted to  
11 make sure the record reflects who is on the  
12 deposition.  
13 MR. SMITH: For sure.  
14 MR. KEMNA: Okay. To continue, manila  
15 folder number 10 is the follow-up report from  
16 Dr. Tomashefski dated March 13, 1998.  
17 Number 11 is another letter from  
18 Tomashefski dated May 18, 2001.  
19 Number 12 is a deposition of Dr.

20 Tomashefski dated December 20, 1997.

21 Number 13 is a report of Dr. Feingold  
22 dated October 20, 1997.

23 For right now, Number 14 is the report  
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13  
1 of Dr. David Sidransky dated May 18, 2001.

2 Number 15 for right now doesn't have --

3 MR. SMITH: When you say "for right  
4 now," you mean what?

5 MR. KEMNA: Do we have the Halpern  
6 paper?

7 THE WITNESS: Yes. It's right here.

8 MR. KEMNA: Yes, this is in 16. Well,  
9 I'll tell you what. On Number 15, I don't  
10 have anything in it right now.

11 MR. SMITH: Oh, you mean in the pocket?

12 MR. KEMNA: Yes, in the --

13 THE WITNESS: It's this. 15 just has  
14 nothing in it.

15 MR. KEMNA: Right. See, the file folder  
16 numbered 15 --

17 MR. SMITH: Is empty?

18 MR. KEMNA: It is empty for right now.  
19 We might be able to retrace what was actually  
20 in it, but we will have all the materials here  
21 identified.

22 Number 16 is the paper with lead author  
23 Michael Halpern in the Journal of National Cancer  
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14  
1 Institute, "Patterns of Absolute Risk of Lung  
2 Cancer Mortality in Former Smokers."  
3 MR. SMITH: Okay. 17, Lee?

4 MR. KEMNA: Yes. 17 is the Peter Lee  
5 paper.  
6 MR. SMITH: 18?  
7 THE WITNESS: There is no 18.  
8 MR. KEMNA: I don't have an 18 here  
9 right now, but I think I have identified  
10 probably what is Number 15.  
11 MR. SMITH: Okay.  
12 MR. KEMNA: That would be Dr. Feingold's  
13 report dated May 18, 2001.  
14 MR. SMITH: Okay.  
15 MR. SMITH: Do you have a 19?  
16 MR. KEMNA: I don't believe we have a 19.  
17 MR. SMITH: Do you have anything after  
18 17?  
19 MR. KEMNA: No.  
20 THE WITNESS: There is a black set of  
21 records. You never know what's here.  
22 MR. KEMNA: Oh, wait a minute. There is  
23 one other item in this redwell, which is Dr.  
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15  
1 Feingold's report. I believe it is his  
2 generic report.  
3 MR. SMITH: Where do you have that at?  
4 MR. KEMNA: Well, it didn't happen to  
5 make its way into one of these folders, or it  
6 may have been at one time, but is not now.  
7 MR. SMITH: Do you want do put it in 18,  
8 then?  
9 MR. KEMNA: We don't have a Number 18.  
10 MR. SMITH: Oh, your folders end at 17?

11 MR. KEMNA: Right.

12 MR. SMITH: Okay.

13 BY MR. SMITH:

14 Q Okay. Now, do you have with you the

15 report of the Surgeon General on "The Health

16 Benefits of Smoking Cessation," 1990?

17 MR. KEMNA: Would you like Dr. Sherry

18 to respond?

19 MR. SMITH: Yes. Yes, that's fine.

20 BY MR. SMITH:

21 Q Dr. Sherry --

22 A Yes.

23 Q -- do you have with you today "The

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16

1 Health Benefits of Smoking Cessation" by the

2 Attorney General?

3 A That book?

4 Q I mean of the Surgeon General.

5 A I don't have it on me.

6 Q Okay. Do you have -- the books that

7 you have are titled what?

8 A Cancer, Principles and Practice.

9 Q Is that by Hellman and Rosenberg?

10 A Yep, sixth edition.

11 Q And the other books?

12 A Clinical Oncology by Abeloff, Textbook

13 of Thoracic Oncology by Aisner, Confronting Cancer,

14 by myself, and I guess there is another book on the

15 list I don't have on me.

16 I forgot to bring it. I couldn't carry

17 it.

18 Q I am struggling here on -- the only

19 book -- you have -- do you have a book, Cancer  
20 Medicine, fourth edition?

21 A I left it in my office.

22 Q Do you have a book, Thoracic Oncology,  
23 second edition, by Roth?

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17

1 A Yes.

2 Q And do you have a book, Clinical  
3 Oncology, second edition, by Abeloff and Armitage?

4 A Yep.

5 Q And do you have another book that you  
6 wrote?

7 A Yep.

8 Q The name of your book is?

9 A Confronting Cancer. Do you need the  
10 whole -- do you want the whole reference?

11 Q I think, "How to Care for it Today and  
12 Tomorrow"?

13 A Yep, 1993. Let me think.

14 '94, Plenum --

15 Q Okay.

16 A -- New York.

17 MR. SMITH: I would like to mark and --  
18 I would like to mark some of these books as  
19 exhibits, and I would like to work out some  
20 way -- he wants to retain physical custody of  
21 these books, you are indicating?

22 MR. KEMNA: Well, Russ, these are  
23 publicly available textbooks.

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18

1 MR. SMITH: I understand that they may

2 or may not be, and the problems of getting  
3 them, but I would like to get them marked as  
4 exhibits and go from there on it.

5 MR. KEMNA: Well, Dr. Sherry is  
6 retaining possession of these textbooks.

7 MR. SMITH: Well, whatever. I mean, he  
8 is going to do -- I have no physical power to  
9 control what he does.

10 First, a couple of reasons: One, I  
11 don't know how tough you are, and number two,  
12 you are 150 miles from me, but I would ask the  
13 court reporter to mark them.

14 Do you have any trouble with that?

15 MR. McLAUGHLIN: Now, Russ, I have a  
16 problem with it. It think it's --

17 MR. SMITH: I mean, with having them  
18 marked?

19 MR. McLAUGHLIN: Yes, because it is  
20 non-traditional to mark textbooks that go a  
21 couple of thousand pages and expect that there  
22 would be records in the case.

23 MR. SMITH: Well, he can retain physical

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19

1 custody. I have already said that --

2 MR. McLAUGHLIN: Well, yes.

3 MR. SMITH: -- but I would like to have  
4 them marked as exhibits.

5 MR. McLAUGHLIN: Well, what is the  
6 purpose of marking?

7 MR. SMITH: I want to have them clear.

8 I just want to have a clear record, so when we  
9 are talking about them.

10 I don't care if she puts -- as long as  
11 he can keep it together with them during the  
12 course of this case, which is only going to be  
13 a couple more months, if you just put a piece  
14 of paper in there with the exhibit number, for  
15 all I care.

16 MR. McLAUGHLIN: All right. But you are  
17 not asking that the doctor give up possession  
18 and control of his textbooks?

19 MR. SMITH: Not at this second.

20 MR. McLAUGHLIN: Well, at any time?

21 MR. SMITH: Well, I don't -- how do I  
22 know? If Judge Dowd would order it, I guess.

23 I just wanted to have them identified

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20

1 clearly right now --

2 MR. McLAUGHLIN: Well --

3 MR. SMITH: -- as part of the depo.

4 MR. McLAUGHLIN: Well, let me just say,

5 I am objecting to what you are doing, if you  
6 are going to expect the doctor to hand carry a  
7 bunch of textbooks into the courtroom, but we  
8 will address that with Judge Dowd.

9 If you want to have them marked for  
10 purposes of this deposition, that is fine,  
11 but --

12 MR. SMITH: That's what I want to do.

13 MR. McLAUGHLIN: -- we ought to agree

14 that these textbooks are staying with the  
15 doctor, and they are not going to be carried  
16 --

17 MR. SMITH: I don't have any problem  
18 with your taking physical custody of them --  
19 MR. McLAUGHLIN: All right.  
20 MR. SMITH: -- but I am not stipulating  
21 beyond that, though.  
22 MR. McLAUGHLIN: Well, neither are we.  
23 MR. SMITH: I am not asking you to.  
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21  
1 MR. McLAUGHLIN: Okay. Russ, you are --  
2 MR. SMITH: We will get them marked and  
3 move on.  
4 MR. KEMNA: Here is what we are going to  
5 do.  
6 We will hand the court reporter a pad  
7 that she can put the Deposition Exhibit marker  
8 on, and we will insert it into the book, and  
9 we can use it for purposes of identification  
10 during the course of the deposition.  
11 MR. SMITH: That's fine, and I am going  
12 to ask him to keep it with the book when he  
13 leaves.  
14 MR. McLAUGHLIN: Okay.  
15 MR. SMITH: I think there's -- it sounds  
16 like there are four of them there.  
17 MR. KEMNA: Yes.  
18 (Discussion off the record.)  
19 (Whereupon, the books were marked as  
20 Sherry Deposition Exhibits 2, 3, 4 and 5 for  
21 identification.)  
22 MR. SMITH: Is Cancer, Principles and  
23 Oncology, is that one?

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1 THE WITNESS: That's --

2 THE REPORTER: That would be 2.

3 THE WITNESS: The sixth edition.

4 MR. SMITH: All right. The sixth, sixth  
5 edition. Cancer, Principles and Practice of  
6 Oncology is Exhibit 2?

7 MR. McLAUGHLIN: No. Look, why don't  
8 you just have us tell you what they are?

9 MR. SMITH: Great. Go for it.

10 MR. McLAUGHLIN: Exhibit 2, Russ, is the  
11 Confronting Cancer, the book by Dr. Sherry.

12 MR. SMITH: All right.

13 MR. McLAUGHLIN: Exhibit 3 is Cancer,  
14 Principles and Practice of Oncology, sixth  
15 edition.

16 MR. SMITH: Yes, sir.

17 MR. McLAUGHLIN: Number 4 is  
18 Comprehensive Textbook of Thoracic Oncology.

19 MR. SMITH: Is that in that Reliance  
20 list Number 17? It just says "Thoracic  
21 Oncology" on it, the book.

22 MR. McLAUGHLIN: Well, it looks to me  
23 like the authors are different.

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1 This is edited by Aisner and others.

2 MR. SMITH: Then maybe I ought to -- if  
3 you can define that very clearly, like you  
4 would on the Reliance list for me --

5 MR. McLAUGHLIN: Okay.

6 MR. SMITH: -- because it is a different  
7 book than is here.

8 MR. McLAUGHLIN: All right. I am going  
9 to hand that to Dr. Sherry, and he is going to  
10 tell you exactly what it is.

11 THE WITNESS: I just saw, the name was  
12 the same.

13 MR. KEMNA: Russ, I think apparently  
14 what we have here is a textbook that, as Dr.  
15 Sherry was leaving his office, he may have  
16 picked up by mistake, rather than one that is  
17 reflected on the list here.

18 MR. SMITH: Is that book not one that he  
19 is relying on?

20 THE WITNESS: Yes.

21 MR. SMITH: Is that right?

22 THE WITNESS: Yes, that's right.

23 MR. McLAUGHLIN: Okay. Yes. Dr. Sherry  
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24  
1 says it's right.

2 THE WITNESS: Yes. I actually -- I  
3 picked up the wrong book.

4 MR. SMITH: Okay.

5 THE WITNESS: It's the same title,  
6 a different year.

7 MR. SMITH: All right. Then the other  
8 one that you have?

9 MR. KEMNA: Exhibit Number 5 is titled  
10 Clinical Oncology.

11 MR. SMITH: Is that 5 or 4?

12 MR. KEMNA: That is Exhibit 5.

13 MR. SMITH: And which one is 4? Is  
14 that --

15 THE WITNESS: 4 was the mistake.

16 MR. KEMNA: 4 was the mistake.

17 MR. SMITH: Then why don't we delete

18 that? We will just, say, use that 4 on

19 another one, then. I think it will work for

20 us.

21 Or leave 4 on it. That's okay. I guess

22 that is clear. I'm sorry.

23 And then Number 6 would be Cancer

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25

1 Medicine?

2 THE WITNESS: I didn't bring it.

3 BY MR. SMITH:

4 Q Okay. So there's three books on your

5 reference or Reliance materials that you do not

6 have, and one of them is the report of the Surgeon

7 General, 1990? Is that correct?

8 A Yes.

9 Q And another one is Cancer Medicine,

10 fourth edition? Is that correct?

11 A Yep.

12 Q And the last one is Thoracic Oncology,

13 second edition?

14 A Yes.

15 MR. SMITH: Okay. Okay. We will go

16 ahead on this.

17 I would like to get the Hellman and Lee

18 articles marked.

19 MR. KEMNA: All right. Lee, which

20 was in Folder Number 17?

21 MR. SMITH: Yes, sir.

22 MR. KEMNA: I will set it in front of

23 the court reporter.

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26

1 MR. SMITH: That would be Number 6,

2 then?

3 MR. KEMNA: Yes, that would be Number 6.

4 MR. SMITH: And Halpern will be 7?

5 MR. KEMNA: Yes, if I can locate it

6 here.

7 Okay. The Halpern article is in Folder

8 Number 16, and I will put that here for the

9 court reporter to mark as well.

10 Also, Russ, while we are dealing with

11 all the materials brought to the deposition,

12 we have two x-rays, actually, I should say two

13 folders of x-rays.

14 The first one is exam date June 9,

15 1992. It is a CT of the chest, with

16 enhancement.

17 MR. SMITH: Okay.

18 MR. KEMNA: It lists six films on the

19 cover for the folder, and there are six films

20 in that folder.

21 The second folder --

22 MR. SMITH: And those are from what

23 medical facility?

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27

1 MR. KEMNA: This is from Cuyahoga Falls

2 General Hospital Radiology Department --

3 MR. SMITH: Okay.

4 MR. KEMNA: -- and it has an obtained

5 date of October 27, 1994, so that's the date

6 we actually obtained the x-rays, as opposed to

7 the exam date that I gave you.

8 MR. SMITH: Okay, sir.

9 MR. KEMNA: The second folder has an

10 obtained date of October 27, 1994.

11 The exam date is June 9, 1992.

12 That's the chest PA and lateral view, so

13 there's two films --

14 MR. SMITH: Okay.

15 MR. KEMNA: -- in the folder, and it is

16 also from Cuyahoga Falls General Hospital.

17 MR. SMITH: Okay. We ought to mark

18 those, then, 8 and 9, please.

19 MR. McLAUGHLIN: Let the court reporter

20 catch up with the marking, Russ, so everybody

21 just sort of needs to give the court reporter

22 about two minutes, right?

23 Okay.

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28

1 (Discussion off the record.)

2 (Whereupon, the documents were marked as

3 Sherry Deposition Exhibits 6, 7, 8 and 9 for

4 identification.)

5 MR. McLAUGHLIN: Okay. Now, Russ, the

6 court reporter has marked Exhibits 6, 7, 8

7 and 9.

8 MR. KEMNA: Did you get that, Russ?

9 MR. SMITH: 6, 7, 8 and 9 I have. I am

10 guessing Lee is 6, Halpern is 7, PT, 8, and PA

11 and lateral are 9 --

12 MR. McLAUGHLIN: That's --

13 MR. SMITH: -- correct, or am I missing

14 it?

15 MR. O'NEILL: The CT is 9. The PA and

16 lateral is 8.

17 MR. SMITH: Okay. The PA and lateral

18 are 8, and the CT is 9?

19 MR. O'NEILL: That's right.

20 MR. SMITH: Thank you. Lee is 6?

21 MR. McLAUGHLIN: Yes, Lee is 6, and --

22 MR. SMITH: Halpern is 7?

23 MR. McLAUGHLIN: Halpern is 7, right.

HESS and SMITH - (412) 261-5799 29

1 MR. KEMNA: Yes.

2 MR. SMITH: Thank you. Okay. Mary

3 Ellen, are we ready to go?

4 (Discussion off the record.))

5 MR. SMITH: And I guess, as in the other

6 depositions, the fact that this is being taken

7 by telephone just sort of heightens it

8 somewhat.

9 My understanding is that no one will

10 have any communication with the witness,

11 either orally or in any non-verbal fashion,

12 and we will go forward on that premise.

13 Does that sound okay?

14 MR. McLAUGHLIN: All communications --

15 MR. KEMNA: That's fine.

16 MR. McLAUGHLIN: All communications will

17 be on the record.

18 MR. SMITH: I can't hear you. I'm

19 sorry.

20 MR. McLAUGHLIN: All communications will

21 be on the record.

22 MR. SMITH: Yes, except I don't think  
23 there is any need for communication with  
HESS and SMITH - (412) 261-5799  
30  
1 the witness.  
2 MR. McLAUGHLIN: No, Russ. I just said  
3 that all communication will be on the record,  
4 so if we have to communicate with the witness  
5 or with you during the course of the  
6 deposition, we will do it on the record.  
7 MR. SMITH: Well, I don't know that --  
8 I don't know that -- if you are going to  
9 communicate with the witness, I would like the  
10 record to reflect that is who you are  
11 communicating with.  
12 MR. McLAUGHLIN: That is what I just  
13 said. We will do it on the record.  
14 We will do it verbally on the record so  
15 that you can hear it, and it can be recorded.  
16 MR. SMITH: Fair enough.  
17 BY MR. SMITH:  
18 Q Dr. Sherry, do you have your report with  
19 you?  
20 A Yes.  
21 MR. SMITH: We had better mark that,  
22 also.  
23 - - -  
HESS and SMITH - (412) 261-5799  
31  
1 (Whereupon, the document was marked as  
2 Sherry Deposition Exhibit 10 for  
3 identification.)  
4 BY MR. SMITH:

5 Q Dr. Sherry, are there any other papers  
6 that you brought with you?

7 And the reason I am particularly  
8 concerned about it, I had mentioned everything that  
9 you brought, and I am sure you misunderstood that  
10 that didn't include the report, but is there  
11 anything else that you brought that we may --

12 A I have --

13 Q Pardon?

14 A I have the expert record of Edwin  
15 Bradley --

16 Q Okay. Let's --

17 A -- dated May 14, 2001.

18 Q Anything else?

19 A I have got a notice for the deposition.

20 Q Anything else, sir?

21 A I think that's it, right?

22 Q I don't care if it's scratch notes or  
23 whatever, but any other -- anything else?

HESS and SMITH - (412) 261-5799

32

1 A A piece of paper with about three little  
2 lines I can't read.

3 Q Okay. Anything else?

4 A I believe that's it, isn't it?

5 MR. SMITH: Let's mark 11 and 12 and 13,  
6 then, please.

7 MR. McLAUGHLIN: What do you want  
8 marked, Russ?

9 MR. SMITH: I guess I have the  
10 impression the report -- the report is --  
11 well, no. I withdraw that. The report will  
12 be 10.



13 MR. McLAUGHLIN: The report is 10.  
14 MR. SMITH: Bradley would be 11.  
15 THE WITNESS: Here you go.  
16 MR. McLAUGHLIN: Okay.  
17 MR. SMITH: 12 would be the notice.  
18 MR. McLAUGHLIN: Well, the amended  
19 notice is Sherry Depo 1.  
20 MR. SMITH: Oh, I thought he was  
21 referring to something different.  
22 MR. McLAUGHLIN: No.  
23 MR. SMITH: That's just why I was trying  
HESS and SMITH - (412) 261-5799  
33  
1 to be complete.  
2 MR. McLAUGHLIN: No. Actually, I think  
3 it was the earlier one.  
4 MR. SMITH: It has already been marked?  
5 MR. McLAUGHLIN: No. Notice to take  
6 telephonic deposition --  
7 MR. SMITH: Okay.  
8 MR. McLAUGHLIN: -- so that would be  
9 what? 12?  
10 MR. SMITH: I don't know. I guess I  
11 just was running down the list.  
12 MR. McLAUGHLIN: Okay.  
13 MR. SMITH: And then whatever these  
14 notes are would be 13.  
15 MR. McLAUGHLIN: Okay.  
16 BY MR. SMITH:  
17 Q Does that cover everything, Dr. Sherry?  
18 A Yes, sir.  
19 MR. KEMNA: Russ, let me just clarify,

20 just for completeness sake, I opened the cover  
21 of this black binder with the medical  
22 records --

23 MR. SMITH: Yes, sir.

HESS and SMITH - (412) 261-5799

34

1 MR. KEMNA: -- and there were four  
2 stapled items in there, that if you like, I  
3 can just itemize them for you?

4 MR. SMITH: Okay.

5 MR. KEMNA: Okay. The first one is the  
6 deposition of Andrew Hass of December 19,  
7 1997.

8 The next item is a letter from Dr.  
9 Tomashefski dated March 13, 1998.

10 The next item is a letter from Dr.  
11 Tomashefski dated October 20, 1997.

12 The next item is a letter from Dr. Allan  
13 Feingold dated October 20, 1997, and those are  
14 the four items that were loose within the  
15 black binder.

16 MR. SMITH: Say, you know, this reminds  
17 me of one thing that I was thinking of for  
18 tomorrow.

19 I see here we have on Dr. Hass, we have  
20 had faxed -- we have had FEDEXed to us, that  
21 came in while I was in Florida, these depos,  
22 two boxes of material.

23 If you could ask whoever is in your

HESS and SMITH - (412) 261-5799

35

1 office to somehow get those premarked, so  
2 hopefully they will coordinate with what we  
3 have here, because I don't want to take up the

4 whole four hours, you know, marking stuff that  
5 we are getting in the mail.

6 That would be my request to you guys.

7 Okay?

8 That could help us a lot. I don't want  
9 to -- the stuff, I just got it in the mail,  
10 and there's no way for me -- I don't want to  
11 take up the whole depo marking them, but  
12 that's a request that maybe somebody -- that  
13 one of you guys can get ahold of me.

14 MR. McLAUGHLIN: You know what? I think  
15 Craig Proctor is going to be out --

16 MR. SMITH: Yes.

17 MR. McLAUGHLIN: -- in Montana.

18 MR. SMITH: I think so, too, and that is  
19 why I was asking if somebody from Shook, Hardy  
20 could get word back to Craig that that is our  
21 request.

22 MR. McLAUGHLIN: We are trying to pass  
23 that on to him, but with travel and timing --

HESS and SMITH - (412) 261-5799

36

1 MR. SMITH: Either you will or you  
2 won't, but I just don't want it charged to my  
3 four hours.

4 That's all I'm asking.

5 MR. McLAUGHLIN: Yes.

6 MR. SMITH: I just got them. I mean, we  
7 just received the stuff.

8 MR. McLAUGHLIN: Right.

9 MR. SMITH: I don't mind it for small  
10 amounts, but I don't want to use four hours to

11 do it.

12 MR. McLAUGHLIN: No, no, well,

13 especially since you are going to be up all

14 night reading this stuff.

15 No. We will try to convey that.

16 We will try to catch up with Craig and

17 convey that, Russ.

18 BY MR. SMITH:

19 Q Dr. Sherry, does your report, which has

20 been marked --

21 MR. McLAUGHLIN: Well, none of it has

22 been marked yet, because the court reporter

23 hasn't had a chance to mark it.

HESS and SMITH - (412) 261-5799

37

1 MR. SMITH: Oh, I thought she was ready.

2 I'm sorry.

3 MR. McLAUGHLIN: No. It's sitting at

4 11. Well, but we have got --

5 MR. SMITH: I will let her mark them,

6 and then we can get started. That's okay.

7 MR. McLAUGHLIN: We have got several

8 exhibits that you want marked that haven't

9 been marked yet, so starting with the Bradley

10 report.

11 MR. KEMNA: Let her do it, because as

12 long as we are talking, she can't mark.

13 MR. SMITH: All right.

14 (Discussion off the record.)

15 (Whereupon, the documents were marked as

16 Sherry Deposition Exhibits 11, 12 and 13 for

17 identification.)

18 BY MR. SMITH:

19 Q Dr. Sherry, is Plaintiff's Exhibit  
20 Sherry 10, is that your report in this case?

21 A Yes, sir.

22 Q Is that identical to the one we were  
23 previously provided?

HESS and SMITH - (412) 261-5799

38

1 A I believe so, yes, sir.

2 Q Does that contain all of the opinions  
3 that you intend to express in this case, if asked?

4 A Yes, sir.

5 Q Does it contain all the bases, the  
6 reasons and the facts and information upon which  
7 those opinions are based and which support them?

8 MR. KEMNA: Well, let me just state an  
9 objection.

10 Russ, this is an expert report filed in  
11 compliance with Rule 26 and --

12 MR. SMITH: I am going to object to the  
13 speaking objection, but go ahead.

14 MR. KEMNA: Well, it is a report. It is  
15 filed in compliance with Rule 26.

16 It is what it is represented to be for  
17 this case in Federal Court, and Dr. Sherry has  
18 indicated the essence of his opinions in that  
19 report.

20 MR. SMITH: I am going to -- I am going  
21 to object to speaking objections or anything  
22 that's suggestive.

23 MR. KEMNA: I have stated my objection.

HESS and SMITH - (412) 261-5799

39

1 MR. SMITH: I would ask the court

2 reporter to read the question back to Dr.

3 Sherry.

4 (Discussion off the record.)

5 (Record read.)

6 MR. McLAUGHLIN: Note my objection for  
7 the record as well, because Russ, as you know  
8 --

9 MR. SMITH: I don't want -- I am  
10 objecting to speaking objections.

11 I don't know. That's my -- Dr. Sherry  
12 is the only one that knows.

13 MR. McLAUGHLIN: Well, you can object,  
14 but just as we objected to your speaking  
15 objections at the depositions I have attended,  
16 it didn't deter from you making them.

17 MR. SMITH: I made my -- I tried to  
18 limit my speaking objections to where I  
19 thought there was a misquote of a prior  
20 question or answer, frankly.

21 MR. McLAUGHLIN: Well, that's not my  
22 recollection, but I am going to say what I  
23 have to say, and then I will sit down, but the

HESS and SMITH - (412) 261-5799  
40  
1 expert witness is supposed to prepare a report  
2 which summarizes opinions, and you are  
3 entitled to a discovery deposition to explore  
4 the bases for the opinions.

5 MR. SMITH: Well, that's your -- you  
6 know, that's your judicial opinion, but --

7 MR. McLAUGHLIN: Thank you, sir.

8 MR. SMITH: -- my question is on the  
9 floor to the witness.

10 MR. McLAUGHLIN: All right. Doctor, you  
11 can --  
12 BY MR. SMITH:  
13 Q Dr. Sherry, that is my question, if you  
14 can answer it.  
15 A Well, read it again.  
16 MR. SMITH: Who said, "Read it again"?  
17 MR. McLAUGHLIN: The witness.  
18 THE WITNESS: Yes. I did.  
19 (Discussion off the record.)  
20 (Record read.)  
21 A Well, it contains my -- my opinion  
22 concerning the case.  
23 I don't know.  
HESS and SMITH - (412) 261-5799  
41  
1 Q Does it contain what supports those  
2 opinions, what you are basing them on?  
3 A Well, that, plus my experience in  
4 practice and life.  
5 Q Pardon? I can't hear you.  
6 A Yes, and it -- but I would also say my  
7 opinions are based on my life's experience as well.  
8 Q And by "life experience," you mean what?  
9 A Professional life experience.  
10 Q What does that mean?  
11 A Practicing medicine for eighteen years,  
12 or fifteen years.  
13 Q That's your experience as a physician?  
14 A Yes, sir.  
15 Q And is it based on any -- is it based  
16 on anything else?

17           A       Research I did when I wrote the book,  
18   periodic reading that you do, keeping up, you know,  
19   other professional things like that, the routine  
20   you know, routine professional readings and  
21   experiences, you know, in a clinical practitioner.

22           Q       Well, I want to know, as we go through  
23   here, the specifics of it to the best of your

                  HESS and SMITH - (412) 261-5799

42

1   ability to give them to us, please, and for  
2   instance, on Item 2 -- I guess on Item 1, you have  
3   no criticism of the medical care that David Tompkin  
4   received is my understanding?

5           A       That's correct.

6           Q       Do you have any criticism of anything  
7   that was done in conjunction with his diagnosis,  
8   treatment, reading of x-rays, anything else, any  
9   criticisms whatsoever?

10          A       I thought it was within reasonable  
11   medical care.

12          Q       So you have no criticisms, as you sit  
13   here right now?

14                   MR. McLAUGHLIN:  Objection.

15                   MR. KEMNA:  Objection.

16   BY MR. SMITH:

17          Q       Is that true or false?  If there are  
18   any, I would just -- I would like to ask you what  
19   they are.

20                   MR. KEMNA:  Objection.

21          A       I thought the medical care was  
22   appropriate.

23          Q       So you are rendering no criticisms as of

                  HESS and SMITH - (412) 261-5799



1     this time?  Is that true?

2           A       Well --

3           Q       That's my question.  If there are, if  
4     you have some, just say yes, and please tell me  
5     what they are.

6           A       My only  -- I have no criticisms at the  
7     present time.

8                   I thought he was treated in a reasonable  
9     fashion to a reasonable standard of community  
10    medical care.

11          Q       Doctor Sherry, in Item Number 2, you  
12    indicate that it was your opinion that to a  
13    reasonable degree of medical certainty, due to  
14    significant risk reduction, his lung cancer is most  
15    likely not related to his smoking history, and you  
16    say that is supported by your clinical experience.

17                  Tell me what about your clinical  
18    experience supports that, please.

19                  MR. SMITH:  Objection.  I think you  
20    mischaracterized his prior answer.

21                  MR. SMITH:  I am looking --

22          A       Okay.

23                  MR. SMITH:  -- at Item Number 2 in his  
                    HESS and SMITH - (412) 261-5799

1                  report.

2                  MR. McLAUGHLIN:  His report, Page 3?

3                  THE WITNESS:  Yes.

4                  MR. SMITH:  Yes, sir.

5                  MR. McLAUGHLIN:  All right.

6     BY MR. SMITH:

7           Q       Will you tell me --

8           A       Well, I --

9           Q       -- specifically what of your clinical  
10       experience supports that?

11          A       Well, there are people that have other  
12       -- I mean, in terms of causality, this gentleman  
13       had other, you know, risk factors for lung cancer,  
14       and I have seen people with adenocarcinomas who  
15       never smoked, and it was not beyond -- you know,  
16       it's rare, but it happens.

17          Q       What is?

18          A       That --

19          Q       Pardon?

20          A       -- people have other risk factors for  
21       lung cancer, and rarely people who never smoked get  
22       adenocarcinoma, so in my experience, people without  
23       any smoking exposure get lung cancer, and the

HESS and SMITH - (412) 261-5799

45

1       medical literature says that the -- you know, the  
2       risk approaches that of a non-smoker.

3                I mean, that's the two things. I think  
4       that is what you are driving at, sir.

5          Q       Let me ask you this: Going back to --  
6       your clinical experience, Dr. Sherry, has been what  
7       with respect to lung cancer?

8                How many lung cancers have you treated?

9          A       Probably 400 --

10        Q       And would those have been --

11        A       -- over 15 years, anywhere between 25  
12       and 50 a year.

13        Q       And that would -- when you say 15  
14       years --

15        A       '86 to 2001 --

16 Q Okay.

17 A -- and then actually, '80 to '86, the  
18 residency and internship.

19 Q And would that be your -- is your best  
20 estimate, then, that the total ones you treated  
21 would be how many?

22 A Oh, somewhere in the three to four  
23 hundred range.

HESS and SMITH - (412) 261-5799

46

1 Q Okay. Of those, have you ever made a  
2 record, trying to determine how many of them  
3 involved smokers, and how many did not, or is this  
4 something you are trying to take your memory back  
5 to --

6 A Well, most of them occur in smokers.

7 Q And when you say "most of them" --

8 A I would say 90 percent.

9 Q And your best estimate would be, about  
10 10 percent of the people you have treated for lung  
11 cancer were not smokers?

12 A Probably five to seven would be closer  
13 to my experience. Probably five.

14 Q Okay.

15 A And then five to seven percent, maybe 90  
16 to 93.

17 Q Okay. Let me catch up. I am reading  
18 that as -- and I want you to correct me if I am  
19 wrong. I am reading, 93 to 95 percent of the  
20 people you have treated for lung cancer were  
21 smokers, and five to seven --

22 A Five to seven.

23 Q -- were non-smokers, as best you can  
HESS and SMITH - (412) 261-5799  
47  
1 recall?  
2 A Yes, sir.  
3 Q Is that a fair assessment of what you  
4 just said?  
5 A Yes, sir.  
6 Q And you base that on recollection, or  
7 recollection combined with something you have read  
8 on the subject?  
9 MR. KEMNA: Objection.  
10 A Probably both.  
11 Q Can you tell me --  
12 A Yes, both.  
13 Q Okay. And you have read -- you  
14 referred to relevant medical literature at the end  
15 of Item 2 on page three of your opinions.  
16 A Uh-huh.  
17 Q Can you tell me what the relevant  
18 medical literature is that you have read, you know,  
19 that supports this opinion?  
20 A Well, when I wrote my book, I went back,  
21 and I made the observation that the risk approaches  
22 the non-smoker at 15 years.  
23 I remember -- and I apologize; I can't  
HESS and SMITH - (412) 261-5799  
48  
1 pull it out -- I did research for that chapter on  
2 lung cancer, and I remember finding that pretty  
3 generally in the -- in the texts of medicine.  
4 Q And that is something --  
5 A -- so --  
6 Q I'm sorry.

7           A       -- that was when I was writing my book.  
8   I'm sorry I can't remember the exact reference.

9           Q       Dr. Sherry, in your book, did you make  
10 that statement?

11          A       I think it's close to that statement,  
12 yes, sir, that the risk approaches the non-smoker  
13 after 15 years. That was in '93.

14                 I have subsequently read other articles,  
15 a couple that Bernie O'Neill provided, gave me --

16          Q       Did you --

17          A       -- but I wrote in the book that the risk  
18 of lung cancer approaches the non-smoker after 15  
19 years, and I cannot give you the exact reference  
20 that I got that, but I remember, when I was writing  
21 my book, I would resort to the internet and texts  
22 of medicine.

23                 MR. McLAUGHLIN: Doctor, let me hand you  
                  HESS and SMITH - (412) 261-5799

49

1         your book.

2          A       I am looking through my book, sir. Can  
3 I look at the chapter?

4                 Sir, what do you want me to do?

5          Q       You have your book with you, you say?

6          A       Yes. I have got my -- yes. It's  
7 Exhibit 2.

8          Q       I'll tell you what. I would like --  
9 maybe we can come back to it, if we have time.  
10 Okay?

11                 I don't want to take the time.

12          A       Well, no, but you were asking -- I think  
13 -- I just want to make sure I wrote that in the

14 chapter.

15 Q Oh, go ahead, if you can find it, you

16 know, quickly.

17 A I have got a chapter on lung cancer.

18 Q Yes, sir.

19 A Hold on.

20 Q Oh, no, no, no. If you can do that

21 quickly, go ahead.

22 A "A smoker's risk of lung cancer

23 decreases steadily for 15 years following

HESS and SMITH - (412) 261-5799

50

1 cessation, at which point the risk of the former

2 smoker begins to approach that of a person who has

3 never smoked."

4 MR. McLAUGHLIN: What page, Doctor?

5 THE WITNESS: Page 27.

6 BY MR. SMITH:

7 Q So you had stated that it begins to

8 approach that of a person who had never smoked?

9 A Correct.

10 Q And can you -- that chapter --

11 A That's what --

12 Q -- you wrote on --

13 A So I mean, what I am saying is, I am not

14 trying to duck the question.

15 I am saying, I do remember looking stuff

16 up, and I can't give you the reference right now,

17 but it is with respect to my research --

18 Q The --

19 A -- and the book was published in '93,

20 which is way before the proceedings.

21 MR. McLAUGHLIN: Wait for the next

22 question, please.

23 THE WITNESS: Okay.

HESS and SMITH - (412) 261-5799

51

1 BY MR. SMITH:

2 Q There is a question here. Could you  
3 hear me trying to ask two questions just in the  
4 last couple of minutes?

5 A Go ahead.

6 Q I don't know how well the --

7 MR. SMITH: Mary Ellen, are you having  
8 trouble hearing me?

9 (Discussion off the record.)

10 MR. KEMNA: Russ, I think what your  
11 problem may be, and it depends on the design  
12 of the speaker phone, but there may be an  
13 override if someone is talking on this end  
14 while you are talking --

15 MR. SMITH: Yes, sir. That's -- I think  
16 that's true, and I don't know whether --

17 MR. KEMNA: I think the solution for  
18 this, if you don't mind, I will suggest to Dr.  
19 Sherry that he just wait for the question to  
20 be asked and then make sure that the question  
21 was completed before he begins his response,  
22 and hopefully we will avoid cutting off your  
23 question.

HESS and SMITH - (412) 261-5799

52

1 MR. SMITH: Yes. We will do our -- you  
2 know, we will all do our best on it.

3 BY MR. SMITH:

4 Q Dr. Sherry, the -- I think -- I want

5 to make sure I don't have a -- can you hold up  
6 about twelve seconds?

7 MR. KEMNA: Sure.

8 (Discussion off the record.)

9 BY MR. SMITH:

10 Q The book that you are referring to, does  
11 it have a footnote of any kind to that cite, or is  
12 that just -- that's a book that you wrote for your  
13 patients?

14 A That's -- it's not annotated. It is not  
15 scientifically footnoted.

16 Q Okay. I follow you. And that was  
17 written for the benefit of your patients?

18 A Correct.

19 Q And was the sentence in there regarding,  
20 you begin approaching the condition of a non-smoker  
21 risk, was that part of that to encourage your  
22 patients to quit smoking --

23 A I would -- yes.

HESS and SMITH - (412) 261-5799

53

1 Q -- teaching them? You were writing to  
2 them that there is a benefit in quitting smoking?

3 A Correct.

4 Q Okay. You mentioned that Bernie Owens  
5 [sic.], one of the attorneys for Shook, Hardy, gave  
6 you a couple of books to read?

7 A No. An article on risk reduction.

8 Q Do you have that?

9 A It's the Halpern article.

10 Q That's the Halpern. That's where you  
11 received it.

12 And the other article was Lee?



13           A       Yes.  They -- those are two additional  
14   articles.

15           Q       Okay.  When you indicate that in your  
16   own clinical experience, approximately -- I don't  
17   want to misquote this -- approximately 93 to 95  
18   percent of people you had treated, you based that  
19   upon your clinical experience and what you have  
20   read, do you have any recollection about the people  
21   you treated who had lung cancer who hadn't smoked?

22                   MR. KEMNA:  Objection to form.

23           A       I would like to say that in the book, on  
                     HESS and SMITH - (412) 261-5799

54

1   Page 24, I say that it is 85 percent of lung cancer  
2   cases --

3           Q       Okay.

4           A       -- but I mean, there is an inconsistency  
5   with the 93 and the 85, but I have a suspicion -- I  
6   don't know -- that I got that from a text.

7           Q       Which one?  Which?

8           A       The 85 percent number.

9           Q       Okay.  You have revised it?

10          A       In my heart, it would be closer to 90,  
11   but I wanted to point that out.

12          Q       That's fair enough.

13          A       So it is 85 that I wrote, but that's a  
14   ball park, and then you asked me about non-smokers  
15   with lung cancer?

16          A       Yes, sir.  Do you have a recollection of  
17   anything about their characteristics at all,  
18   anything about them at all that --

19          A       Well, the thing I remember most is that

20 they are not happy, because they never smoked.

21 The patients are upset, and they -- the  
22 ones I can remember off the top of my head, I can  
23 remember a couple of adenocarcinomas in people that

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55

1 did not smoke.

2 Q Do you recall whether or not they were  
3 around others who did smoke one way or the other?

4 Do you have any recollection of that?

5 A I think a fair proportion would say that  
6 they have been around smoking in some fashion. I  
7 can't recall exactly.

8 Q Would you have a view as to whether or  
9 not environmental smoke or smoke that people are  
10 around can cause lung cancer?

11 MR. KEMNA: Objection.

12 A I think there's literature saying that  
13 second-hand smoke slightly increases.

14 Q The risk of lung cancer?

15 A The risk of lung cancer.

16 Q Is that your belief as well?

17 A I would -- I think that there are  
18 harmful effects of second-hand smoke.

19 Q Do you think they would include lung  
20 cancer?

21 A Yes.

22 Q Is there anything else, Dr. Sherry, that  
23 you can think of that we haven't talked about that

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56

1 supports your opinion in Paragraph 2?

2 A Well, are we going to talk about  
3 paragraph three next --

4 Q Yes.

5 A -- or I don't know how we want to do

6 this.

7 Q Yes. That's what I was thinking of

8 doing. Does that sound all right to you?

9 A Yes, sir.

10 Q But anything else about two that we have

11 left out that you can think of?

12 MR. KEMNA: Objection.

13 A I think the paragraph states my opinion

14 well.

15 Q Okay. And we have covered what you are

16 basing it upon, to the best of your recollection?

17 MR. KEMNA: Objection.

18 A Well, I mean, you can ask me more when I

19 -- I mean, I --

20 Q I can't really --

21 A Implied is that I am basing it on my

22 life's experience.

23 Q Yes. I am with you.

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57

1 A Okay.

2 Q Is there anything about your life's

3 experience that you can think of, as we are talking

4 here, that supports that that we haven't covered?

5 MR. KEMNA: Objection.

6 A Not that I recall at present.

7 Q Okay. In paragraph three, does

8 paragraph three state the bases and the reasons and

9 the facts and information upon which you base the

10 opinion as set forth in paragraph three, sir?

11 MR. KEMNA: Objection.

12 A Specifically, it can't be determined,  
13 because there's many factors.

14 What -- do you want to give more  
15 specific --

16 Q I think there's really two opinions in  
17 there, in fairness to you.

18 Does that sound right to you?

19 A Well, which ones?

20 Q In paragraph three, it looks to me like  
21 there was an opinion in the first sentence and an  
22 opinion in the last sentence, but I don't know  
23 that.

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58

1 I am asking you, or at least that's what  
2 I thought you were trying to communicate, and if I  
3 missed --

4 A Well, there are other explanations why  
5 this gentleman had lung cancer.

6 Q Yes, sir.

7 A His exposure to asbestos is one.

8 Q Okay.

9 A The family history is another.

10 Q Let's talk about that first, then. Is  
11 that a good place to start out?

12 A Which one do you want to talk about?  
13 The asbestos?

14 Q No. We will start out with both of  
15 them, but that first sentence.

16 A Okay.

17 Q Sure. Let's talk about the asbestos and  
18 your thoughts on that, please.

19           A       The gentleman had a documented exposure  
20   to asbestos that was confirmed pathologically, and  
21   as such, that is a risk factor for cause for  
22   subsequent development of lung cancer.

23 Q And the reason you make that statement

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1 is why? 59

2           A       Well, I think there's a bunch of risk  
3       factors this gentleman has.

4 Q No. But I was talking about the  
5 asbestos first.

6                   The reason it is your view that -- is it  
7    your view that asbestos can cause lung cancer,  
8    asbestos exposure?

9                    A            Yes.

10 Q Okay. And can you tell us what you base  
11 that on?

12           A       The medical literature.

13           0       And anything --

14           A       I think it's an accepted risk factor for  
15   lung cancer.

16 Q And based upon the medical literature?

17           A       I believe, sir, yes.

18 Q Let me ask this question. You listed  
19 the Surgeon General's report.

20 Was that something that you have been  
21 provided with in conjunction with this case?

22           A       Well, I read it over the years.

23 Q You had it? You had it yourself?

HESS and SMITH - (412) 261-5799  
60  
1 A I had it in the early '90s as a source

2 material.

3 Q And that would have been for what  
4 purpose?

5 A Writing my book.

6 Q And your book was written when?

7 A '93. I wrote it from '89 to '92. It  
8 went to -- I started writing it in '89.

9 I finished it in '93, and it went to  
10 press in '94.

11 Q Okay.

12 A I have -- I used to get a lot of  
13 material from the government. There's internet  
14 sources, cheap. There's data bases.

15 Before the internet was so well known, I  
16 used to get stuff from the government data bases,  
17 so I remember seeing that Surgeon General's report.

18 I think the one that Mr. O'Neill brought  
19 in was later than the one that I remember before.

20 Q Let's back up maybe a minute and talking  
21 about getting into the book and the research.

22 You were born in Pittsburgh, is my  
23 understanding?

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61

1 A Yes, sir.

2 Q And did you go to high school in  
3 Pittsburgh?

4 A Central Catholic, the class of '70.  
5 Danny Marino went to my high school.

6 Q He did?

7 A Yes.

8 Q That's pretty impressive. How come he  
9 didn't play for the Steelers? You guys didn't put

10 in enough -- you didn't pay him enough money, or  
11 something?

12 A I'm telling you. You know what?  
13 Mistakes are how you learn.

14 Q And the Pirates?

15 MR. McLAUGHLIN: Well, Namath got away,  
16 too, and he is just right up the road in  
17 Beaver Falls.

18 BY MR. SMITH:

19 Q You don't remember Rosie Rosenblum?

20 A No, sir.

21 Q He used to do Pirates games.

22 A Oh, Rosewell, Rosie Rosewell?

23 Q Rosie Rosewell.

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1 A "Look out, Minnie, here it comes. Open  
2 the door, Aunt Minnie."

3 Q "Open the door, open the window."

4 A "Open the window, Aunt Minnie. Here  
5 comes one," sir.

6 Q Yes.

7 A There you go.

8 Q I had an uncle that used to take me out  
9 to the ball game on the streetcar.

10 Then you went to college at -- you  
11 started out --

12 A George Washington University, from '70  
13 to December of '71.

14 Q And what were you gearing in on being at  
15 that time?

16 A A school teacher.

17 Q And you wanted to teach -- was it  
18 history you wanted to teach?

19 A Yes, sir.

20 Q What were your activities in high  
21 school?

22 What types of things did you like, other  
23 than going to school?

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63

1 A I ran track. I ran cross country. I  
2 was very -- pretty active in the things kids do.

3 We had big track teams.

4 Q Did you work part time also?

5 A I worked pretty full time in college. I  
6 did not work part time in high school.

7 Q And then when you went to George  
8 Washington, did you work there, also?

9 A No, sir. I worked in the summers at my  
10 dad's plumbing shop.

11 Q Your dad had his own plumbing company?

12 A Yes, sir.

13 Q How about your mom?

14 A She was a housewife.

15 Q Brothers and sisters?

16 A Four. I was the fourth of five.

17 Q You were fourth of five. That was -- I  
18 guess I didn't ask that very well.

19 How many brothers, and how many sisters?

20 A Two sisters, two brothers.

21 Q And then you got a Bachelor of Arts in  
22 history in 1974?

23 A Yes, sir.

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1 Q And that -- you were still thinking of  
2 teaching at that time?

3 A Yes, sir. I am certified to teach in  
4 the state of Minnesota.

5 Q Okay.

6 A Paul Wellstone was one of my politics  
7 teachers. He is a Senator from Minnesota right  
8 now.

9 Q Wow.

10 A He is just like he is now on TV, sir.

11 Q Yes. You have an interesting governor,  
12 too.

13 A I don't know him, sir.

14 Q Dr. Sherry, what happened? In 1974,  
15 what did you then do, following '74?

16 A Well, I did not do well at teaching. I  
17 student taught.

18 I was -- I figured out I wasn't going to  
19 be a good school teacher. I came home.

20 I took organic chemistry at the  
21 University of Pittsburgh at night.

22 Q Yes, sir.

23 A I labored for Local 347 for two years.

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1 That's the plumber laborers local out of  
2 Pittsburgh.

3 Q Okay.

4 A And then I went to medical school in  
5 '76.

6 I worked for my dad's shop, and then I  
7 went down to the union hall when he didn't have any

8 work.

9 Q And then -- I am trying to catch up.

10 Okay. You started medical school then in --

11 A '76 to '80.

12 Q And you went to medical school where?

13 A The University of Pittsburgh.

14 Q Okay. I'm sorry. I see that. I didn't

15 -- I couldn't catch up with that.

16 You graduated from the University of

17 Pittsburgh with a Doctor of Medicine in 1980?

18 A Yes, sir.

19 Q Okay. And then what did you do,

20 Dr. Sherry?

21 A I went to Mercy Hospital for a medical

22 residency for three years, and then in '83, I went

23 to Vanderbilt University for medical oncology for

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66

1 two years, and then in '86, '85, I returned and did

2 a year of hematology at the University of

3 Pittsburgh - Montefiore, and then in '86, I moved

4 out to Sewickley, and I have been practicing at

5 Sewickley Valley Hospital, 1986 to 2001.

6 Q And let's see. You did a fellowship

7 from '83 to eighty -- well, let me back up.

8 '80 to '83, you were -- you did a

9 medicine -- internal medicine specialty, I take it?

10 A Correct.

11 Q And then you went on to oncology at

12 Vanderbilt?

13 A Yes, sir.

14 Q And then you went on to hematology at --

15 I am going to mess up the --

16 A Montefiore.

17 Q -- Montefiore Hospital --

18 A Yes, sir.

19 Q -- of Pittsburgh. Are you -- that is

20 the same group that Dr. Bradley is involved with in

21 a broad sense, or do I have that wrong, the

22 University of Pittsburgh?

23 A No, sir.

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67

1 Q It is not?

2 A No, sir.

3 Q I do have it wrong. I'm sorry. They

4 are different units entirely?

5 A I think Bradley is somewhere in the

6 south, sir.

7 Q I'm sorry. I'm sorry. I am thinking

8 of --

9 MR. McLAUGHLIN: He is in Birmingham.

10 MR. SMITH: There would have been a lot

11 of them.

12 MR. McLAUGHLIN: He is in --

13 MR. SMITH: Pardon?

14 MR. McLAUGHLIN: He is in Birmingham,

15 Alabama.

16 MR. SMITH: Yes, sir. I'm sorry. I

17 was thinking of the one we did with Mary

18 Ellen last week, and that was Dr. -- I

19 pronounce his name poorly, too.

20 UNIDENTIFIED SPEAKER: Fuhrman.

21 MR. SMITH: Fuhrman, yes.

22 BY MR. SMITH:

23 Q Does that sound right, Dr. Fuhrman, the  
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68

1 radiologist?

2 A Okay. What are you asking me about Dr.  
3 Fuhrman, sir?

4 Q Is he in the same group, or is that  
5 connected with --

6 A No, sir.

7 Q That is a different group entirely?

8 A He is at the University of Pittsburgh.  
9 I am in private practice at Sewickley Hospital,  
10 sir.

11 Q Okay. I apologize. I follow you. You  
12 went to school -- you had a fellowship at the  
13 University of Pittsburgh, but you didn't stay  
14 there?

15 You went into private practice in  
16 Sewickley?

17 A Correct.

18 Q Okay. Thanks a lot. And you have had  
19 continuing medical education?

20 A Yes, sir.

21 Q You worked for Pennsylvania Medical  
22 Society membership. Can you tell me about that a  
23 little bit, '97 to '99?

HESS and SMITH - (412) 261-5799

69

1 A They have a requirement you have to have  
2 so many hours of education. I believe it's over --  
3 I can't tell you how many, but there's  
4 requirements, and to be on the staff at Sewickley  
5 Hospital, you have to keep up your continuing  
6 medical education certificate, and the county

7 societies and the state societies set the  
8 requirements.

9 Q Okay. What type of cancer do you deal  
10 with mostly --

11 A The three commonest --

12 Q -- if there is one that predominates?

13 A The three commonest cancers at Sewickley  
14 Valley Hospital would be colon cancer, lung cancer,  
15 and breast cancer.

16 That would be the three most common,  
17 although we have a fairly representative practice,  
18 you know, a number of other ones less common.

19 Q Would colon, lung, and breast cancer be  
20 three of the most common in the country?

21 A Yes, sir.

22 Q So your hospital has a fairly  
23 broad-based cancer -- it is a fairly broad based

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70

1 cancer center?

2 A It is a community hospital --

3 Q Yes.

4 A -- and it is representative of the  
5 population we serve.

6 Q So it is fairly representative, like you  
7 just -- as you have just stated, of your community,  
8 which is probably fairly representative of most  
9 communities? Would that be right?

10 A I would bet --

11 MR. KEMNA: Objection.

12 A -- yes.

13 Q Do you also have -- do you have an

14 orthopedic department there as well, is my belief,  
15 my recollection?

16 A Yes, sir. Well --

17 Q So you are a fairly full service  
18 hospital?

19 A Yes, sir.

20 Q Have you been at many legal matters,  
21 litigation, serving as an expert on either advice  
22 or rendering reports or testifying?

23 Have you been involved before in cases?

HESS and SMITH - (412) 261-5799

71

1 A I think I have been involved in two  
2 cases in my life as a witness.

3 Both involved patients I take -- I was  
4 the medical -- the attending physician.

5 Q I notice a case. I am looking at the  
6 back right now. There was a case, Cochran versus  
7 Penn State Disability?

8 A Yes, sir. That was, Mr. Cochran was one  
9 of my patients.

10 Q Yes, sir.

11 A I gave a video deposition concerning his  
12 myelodysplastic syndrome and possible benzene  
13 exposure, because he was a coke oven inspector down  
14 at the mill.

15 Q And his disease?

16 A Myelo -- bone marrow failure,  
17 myelodysplastic syndrome, a state of bone marrow  
18 failure, sir.

19 Q Yes, sir. I hear you. Okay. And the  
20 other one?

21 A Many years ago -- it was in the late

22 '80s -- I had a gentleman by the name of Frederick  
23 Roby. It's probably '88.

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72

1 He was involved in asbestos litigation.

2 Q And you testified?

3 A That he had asbestos exposure and died  
4 of malignant mesothelioma.

5 Q Do you see many mesotheliomas?

6 A We see -- you know, we are across the  
7 river from Neville Island. That is where the  
8 landing boats for the Second War were built.

9 Q Yes, sir.

10 A There's a lot of asbestos on those  
11 boats, and we see probably a disproportionate  
12 amount of malignant mesothelioma, or we see a fair  
13 amount of it, due to the -- you know, the Neville  
14 Island exposure of the landing boats.

15 Q Yes, sir. When was the first time you  
16 were ever contacted about having any involvement  
17 with tobacco litigation?

18 A John Brillman called me to meet with  
19 Bernie O'Neill in about 1989 about -- to review a  
20 case for Mr. O'Neill, who is in the room.

21 Q I have to tell you -- I should know this  
22 name I am sure, because of -- but I have heard a  
23 lot of names of people I didn't know before, and

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73

1 John Brillman I can't get a handle on.

2 A He is a physician, and he is a  
3 neurologist.

4 Q Okay.

5           A       He wanted me to do -- do you want the  
6 details?

7           Q       Sure, if you don't mind.

8           A       Mr. Grigsby is an -- was an attorney in  
9 town.

10                   He asked Joan to find somebody who John  
11 felt would be reasonable. John Brillman is a  
12 neurologist down at Allegheny.

13          Q       Okay.

14          A       So he could not get his first choice to  
15 look at the chart, and he called me up and asked me  
16 to do a favor for him, so I met with Mr. Grigsby,  
17 Mr. O'Neill, and a few other attorneys sometime in  
18 '89 or '88 to review a case.

19                   I probably reviewed four or five cases  
20 for Mr. O'Neill over 12 years.

21                   I have never testified for any of them  
22 except this one.

23          Q       And your --

HESS and SMITH - (412) 261-5799

74

1          A       This is the first deposition I have ever  
2 given for the tobacco company.

3          Q       Do you smoke, or have you smoked?

4          A       I used to smoke when I was a school  
5 teacher and in college.

6          Q       You smoked from, say, about when to  
7 when?

8          A       I used to smoke in bars.

9          Q       Do you know from about what age?

10          A       It was very sporadic in my college  
11 years. I never smoked outside of a bar.

12          Q       It would be a social thing to do in a



13 bar, if you were there?

14 A Yes. Yes, sir. I think that's fair.

15 Q Has your wife smoked?

16 A No, sir. She used to smoke in nursing  
17 school, she told me.

18 Q Pardon? She smoked in nursing school?

19 A She smoked in nursing school. I think  
20 everybody in nursing school smokes, from what I can  
21 gather.

22 Q How about your children? Do any of them  
23 smoke?

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75

1 A No, sir. Well, not that I know of, sir.  
2 Sometimes children do things you are not aware of.

3 Q Did your dad smoke?

4 A Lucky Strikes, sir.

5 Q About how many? How long did he smoke?

6 A He smoked until he had his myocardial  
7 infarction in 1966, June. He smoked two packs per  
8 day, I think, up until '66.

9 Q And about how many years did he smoke,  
10 as you understand it?

11 A You know, I can't tell you that, but I  
12 suspect he smoked from the '30s to '67.

13 He quit when he had his heart attack in  
14 '67, the spring.

15 Q He is -- did things go okay for him  
16 after that?

17 A He died in '88 of coronary disease.

18 Q Did your mom smoke at all?

19 A I -- I don't think. No, I don't think

20 ever. Never.

21 Q How about your brothers and sisters?

22 A My brother, Timmy, smoked when he was in  
23 Vietnam.

HESS and SMITH - (412) 261-5799

76

1 Q Is he the only one that you are aware  
2 of, maybe other than just trying it?

3 A He quit. My brother quit in the '70s,  
4 and nobody I know else -- my siblings don't smoke.

5 Q The four or five other cases you have  
6 been involved in, the involvement you had was to do  
7 what?

8 MR. KEMNA: I am going to object to the  
9 extent that you are making an inquiry into  
10 matters that Dr. Sherry would have been in the  
11 role of a confidential consultant in  
12 litigation that is subject to privilege, and  
13 so any details that you inquire into are  
14 objectionable on that basis, and I will  
15 instruct Dr. Sherry not to answer the question  
16 to the extent that you are making inquiries  
17 into the details of those matters.

18 MR. McLAUGHLIN: I join in the  
19 objection.

20 MR. SMITH: You are saying that you  
21 think that has a work product basis?

22 Is that the basis of your objection?

23 MR. KEMNA: The basis is privilege, and

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77

1 yes, the source is work product.

2 MR. SMITH: I mean, I can't -- I am not  
3 catching up with the privilege issue at all,

4 and maybe I should, but I have to tell you, I  
5 am not.

6 MR. KEMNA: Well, my standing  
7 instruction to Dr. Sherry is not to answer  
8 questions regarding the detail of matters that  
9 he would have been involved in the role as a  
10 consulting expert and not otherwise disclosed  
11 as an expert witness or otherwise having  
12 testified in the matters in which -- to which  
13 you are inquiring.

14 THE WITNESS: So do I answer or not?

15 MR. McLAUGHLIN: Right.

16 MR. KEMNA: You don't answer, Dr.  
17 Sherry?

18 THE WITNESS: Oh, I'm sorry.

19 MR. KEMNA: Russ --

20 MR. SMITH: No. I hear you.

21 MR. KEMNA: -- can we --

22 MR. SMITH: I don't -- I am not sure I  
23 agree with you at all, and I am just waiting.

HESS and SMITH - (412) 261-5799

78

1 I am just thinking a minute.

2 MR. KEMNA: Well, let me give you a  
3 chance to think, and let's take a brief break,  
4 if you don't mind?

5 MR. SMITH: Sure. No. It's a good  
6 time. I can always use a little longer to  
7 think, unfortunately.

8 (Discussion off the record.)

9 MR. SMITH: Is our trustworthy person  
10 who manages the clocks there?

11 MR. KEMNA: Yes. Mr. O'Neill can handle  
12 this effectively.

13 MR. SMITH: Yes. That might be -- what  
14 time did we start?

15 MR. O'NEILL: We started at 4:12. Now  
16 it is 5:32.

17 MR. SMITH: How much time did we take  
18 marking those documents?

19 MR. McLAUGHLIN: Well, Russ, you took a  
20 long time.

21 MR. SMITH: I did?

22 MR. McLAUGHLIN: Yes.

23 MR. SMITH: Okay. I will be back in  
HESS and SMITH - (412) 261-5799  
79  
1 five.

2 MR. SHIVELY: Say, who all is here from  
3 the defense? This is Ben Shively. I am just  
4 curious.

5 MR. KEMNA: Don Kemna from Shook, Hardy  
6 & Bacon. Bernie O'Neill from Shook, Hardy &  
7 Bacon.

8 MR. McLAUGHLIN: Patrick McLaughlin.

9 MS. HAMMERHAND: And Colleen Hammerhand  
10 for Liggett.

11 MR. SHIVELY: Okay.

12 MR. McLAUGHLIN: Oh, okay. Well,  
13 Liggett had not identified themselves. When  
14 did you get on, Colleen?

15 MS. HAMMERHAND: We were on first.

16 MR. McLAUGHLIN: Pardon me?

17 MS. HAMMERHAND: We were on first.

18 MR. McLAUGHLIN: Oh, you were?

19 MS. HAMMERHAND: Yes. I thought that  
20 was picked up there. My apologies.

21 MR. McLAUGHLIN: No, I don't think it  
22 was.

23 Was it?

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80

1 MR. KEMNA: No. That's the first time  
2 we heard that particular voice.

3 MR. McLAUGHLIN: Yes.

4 MR. KEMNA: Okay. We are off.

5 (Recess taken.)

6 MR. SMITH: I am going to ask you to  
7 reconsider your position on what you did, even  
8 if it is as a private consultant.

9 I mean, I may be wrong, but I am going  
10 to suggest to you that we would submit that  
11 being a private consultant in a case might or  
12 might not be shielded in that particular case,  
13 but we are now after the fact.

14 Those cases are over, and here we are.  
15 I don't know why it would be shielded at this  
16 time.

17 MR. KEMNA: Well --

18 MR. SMITH: It is not being -- it is not  
19 being invaded either for violation of a work  
20 product exclusion or purposes of the case in  
21 which it occurred, either.

22 It is not like someone sitting on the  
23 sidelines, and somebody else does all the work

HESS and SMITH - (412) 261-5799

81

1 in the case.

2 I mean, I don't -- but at any rate, it  
3 is our -- we would submit that we think it is  
4 appropriate, and you guys will do as you wish.

5 MR. KEMNA: Well, let me just say, you  
6 are entitled to your opinion, Russ --

7 MR. SMITH: Absolutely. I --

8 MR. KEMNA: -- and we will maintain our  
9 position on the objection and the instruction  
10 not to answer within the scope as it was  
11 described in the objection.

12 Whether or not you can successfully  
13 challenge that point I think we should just  
14 leave to a later point, where if you choose,  
15 you can address it with the Judge.

16 BY MR. SMITH:

17 Q Okay. I guess, just to make sure that  
18 we are square on it, Dr. Sherry, you are indicating  
19 to me that at about 1989, you were asked to review  
20 a particular file in a pending case? Is that  
21 correct?

22 A Correct.

23 Q And can you tell us what that case was

HESS and SMITH - (412) 261-5799

82  
1 about?

2 MR. KEMNA: Objection on the same basis  
3 as previously stated. To the extent that Dr.  
4 Sherry has been a confidential consultant in  
5 litigation in matters where he was not  
6 otherwise disclosed as an expert witness --

7 MR. SMITH: If he --

8 MR. KEMNA: -- or testified at  
9 deposition or at trial, we will instruct Dr.

10 Sherry not to answer the question with respect  
11 to inquiries into those matters in any way  
12 designed to get specific information about  
13 those matters.

14 BY MR. SMITH:

15 Q Dr. Sherry, when you were involved with  
16 that case, you were asked to look at a particular  
17 case? Is that true?

18 A Yes.

19 Q Is that what you recall? Is that right,  
20 sir?

21 A The initial case was a patient in the  
22 suburbs of Pittsburgh.

23 Q And did you render a report in that  
HESS and SMITH - (412) 261-5799

83

1 case?

2 A I never -- I met with Mr. O'Neill  
3 verbally.

4 I never -- I have never rendered a  
5 report, written, except the one you see.

6 Q And you were not listed as a witness, to  
7 the best of your understanding?

8 A I am certain I was not.

9 Q And the conversations you had regarding  
10 that case were what?

11 MR. SMITH: Objection. The same  
12 objection as before, Russ.

13 I don't know that I can make it any more  
14 clear.

15 MR. SMITH: You are instructing him not  
16 to answer?

17 MR. KEMNA: He is being instructed not  
18 to answer on exactly the same basis as I have  
19 repeated now two or three times.

20 BY MR. SMITH:

21 Q Now, were you also consulted regarding  
22 other tobacco matters in the years to follow?

23 A Probably four or five cases, to my  
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1 memory.

84

2 Q And can you give me the approximate year  
3 of each of them, as best you can recollect it? And  
4 give me a range that you are comfortable with,  
5 please, Dr. Sherry.

6 A Okay. I saw -- I did a case in '89 or  
7 '90, and then I can think of one in '92, one in  
8 '94, one in '97, so I may be under or over  
9 estimating.

10 I would bet that it was no more than  
11 five cases.

12 Q Your best --

13 A Generally, we would meet. I would go  
14 through the records.

15 I would answer some questions about the  
16 clinical aspects of the case, and as Mr. O'Neill's  
17 style, I would never hear anything about it.

18 I would have to ask him about the case  
19 if I ever saw him again, and then, you know, I --  
20 that was it.

21 Q Would you ever express an opinion as to  
22 whether or not an injury was tobacco related?

23 MR. KEMNA: Objection to the extent that  
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1       you are making inquiry into the specific  
2       opinions of Dr. Sherry with respect to any  
3       matter that he participated in as a  
4       confidential consultant, and now you know on  
5       the record that he was not listed as an expert  
6       witness, nor otherwise provided testimony in  
7       the case.

8               I am instructing Dr. Sherry not to  
9       answer.

10              MR. McLAUGHLIN: We join in the  
11       objection and the instruction.

12              MR. SMITH: Are you representing that  
13       there was no intention on the part of any of  
14       the tobacco companies or the Shook, Hardy &  
15       Bacon firm to use him as a witness in any of  
16       those cases, depending upon what answers he  
17       gave them, what they heard back?

18              MR. KEMNA: Russ, I think that now you  
19       are getting into the area of improper exchange  
20       of viewpoints on a legal issue relating to the  
21       question of whether or not work product  
22       applies within the scope as I have already  
23       described it.

              HESS and SMITH - (412) 261-5799

1              As I suggested before, if you wish to  
2       challenge the basis for the objection and the  
3       instruction, you have an opportunity to do  
4       that with the Judge at an appropriate time,  
5       and he can hear all of the arguments, but we  
6       will not resolve anything today by discussing  
7       it.

8 MR. SMITH: I am just trying to make the  
9 record clear as best I can, and I guess what I  
10 was trying to find out was whether or not you  
11 gentlemen, when you first approached Dr.  
12 Sherry, had made a decision prior to speaking  
13 to him at all that he would only be used in a  
14 consulting fashion, whether or not that  
15 decision was made before you ever talked to  
16 him about those cases, or whether it was made  
17 after you began talking with him --

18 MR. KEMNA: Russ, this is --

19 MR. SMITH: -- and I guess that is  
20 something that you don't want to discuss  
21 today.

22 MR. KEMNA: Well, this is your  
23 deposition of Dr. Sherry, not of me or any

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87  
1 other counsel sitting at the table.

2 If you wish to discuss the arguments  
3 that may apply to the application of a  
4 privilege with a work product protection,  
5 there is an appropriate time to do that, and  
6 now is not the time.

7 MR. SMITH: I would ask the court  
8 reporter to order the witness to answer the  
9 past questions that have been asked of him,  
10 and that have been -- to which he has been  
11 instructed not to answer.

12 (Discussion off the record.)

13 MR. SMITH: Do you waive any of those  
14 requirements?

15 THE REPORTER: We don't have the power

16 in Pennsylvania to do that.

17 MR. KEMNA: Russ, did you understand  
18 what the court reporter just said?

19 MR. SMITH: No, sir, I didn't.

20 MR. KEMNA: She said that in  
21 Pennsylvania, she does not have the power to  
22 give such an instruction.

23 (Discussion off the record.)

HESS and SMITH - (412) 261-5799

88

1 MR. SMITH: Let me ask this question:  
2 Are you folks willing to waive any such  
3 requirement, if there should be one?

4 MR. KEMNA: Russ, we are not going to  
5 waive any requirement that may be applicable  
6 directly to the court reporter and whatever  
7 scope of power they are given by state law.

8 That is not something we are going  
9 to intervene in, and that is not something  
10 that I am going to say for the record here  
11 today that the defense counsel is going to  
12 take any particular position with it.

13 We have made our instruction to the  
14 witness.

15 We have made absolutely clear the basis  
16 for our objection and the accompanying  
17 instruction.

18 We are standing on that, and there  
19 couldn't be anything more clear on the record  
20 today.

21 MR. SMITH: Are you making that  
22 instruction to the witness as the attorney for

23 the witness?

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89

1 MR. KEMNA: The instruction is made as  
2 an attorney representing my client in this  
3 matter and representing my client in general  
4 with respect to the litigation involved.

5 MR. SMITH: Would that entitle you to  
6 instruct the witness not to answer?

7 MR. KEMNA: I have already given you the  
8 indication of what I am taking a position on  
9 in terms of work product, and yes, the ability  
10 to instruct the witness under the  
11 circumstances of the work product protection.

12 MR. McLAUGHLIN: And Russ, this is  
13 Patrick McLaughlin. We have an obligation to  
14 so instruct the witness, because if not so  
15 instructed, and the witness answers, then the  
16 privilege may be waived and certainly invaded  
17 both as to attorney/client and work product,  
18 so we have an obligation to object and to  
19 instruct the witness not to answer the  
20 question.

21 MR. SMITH: And I am taking it, I am  
22 assuming that all of the attorneys involved in  
23 this are taking the position that should the

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90

1 -- should Judge Dowd determine that it is  
2 necessary for the witness to be ordered to  
3 answer the question before the issue is right  
4 for the court, that none of you are willing to  
5 waive that requirement?

6 MS. HAMMERHAND: That's right.

7 MR. SHIVELY: That's correct.

8 (Discussion off the record.)

9 MR. SMITH: And I assume now --

10 MR. McLAUGHLIN: Russ, do you have

11 a question for the witness?

12 MR. SMITH: No. I wanted to know what

13 you guys' position is on whether or not you

14 waive that requirement.

15 MR. McLAUGHLIN: Well, we are not

16 waiving anything. Why should we waive?

17 MR. SMITH: I didn't say you should do

18 anything or shouldn't.

19 I just asked if you were.

20 MR. McLAUGHLIN: Why would we have

21 standing to waive Pennsylvania law and

22 procedure on the issue, and the court reporter

23 isn't going to respond to us in defiance of

HESS and SMITH - (412) 261-5799 91

1 Pennsylvania law.

2 MR. SMITH: That wasn't my question, but

3 my question has been answered.

4 That's all I wanted to find out.

5 MR. McLAUGHLIN: I mean, if you want the

6 record to reflect what the doctor is going to

7 do, Doctor, do you --

8 MR. SMITH: No. I am not asking that,

9 Pat.

10 MR. McLAUGHLIN: Because I --

11 MR. SMITH: I want the -- I just asked

12 the question of the counsel.

13 MR. McLAUGHLIN: All right.

14 MR. SMITH: The next question will be to  
15 the witness.

16 MR. McLAUGHLIN: All right.

17 BY MR. SMITH:

18 Q Dr. Sherry, you were paid money for  
19 these consultations, I am assuming?

20 A That's a correct assumption.

21 Q And somewhere you made a decision to  
22 write a book.

23 Can you talk with me about that, what

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92

1 kind -- what led you into wanting to do that?

2 A Jack McKeating, my brother-in-law, had  
3 Hodgkins in 1989, so I went out to Borders, and I  
4 went out to the book stores in Ross Park Mall, and  
5 I went looking for stuff to give to my brothers and  
6 sisters, you know, the McKeatings.

7 There's probably 30 of them. There's  
8 eight kids. They have got a million grandkids.

9 So Jack got diagnosed with Hodgkins. I  
10 went out to the book store, and I thought it was  
11 pretty bad material that, you know, guys like me,  
12 working, taking care of patients wouldn't write a  
13 book, so I thought there was a need for a book that  
14 would explain stuff pretty simple to patients in a  
15 not New Age, touchy-feely, or, you know, down the  
16 middle of the road orthodox medicine, so I thought  
17 there would be, like, a need for that, so I started  
18 writing a book, and then it took me about a year  
19 and a half to get a publisher to pick it up, and in  
20 fact, I didn't get anywhere until one of those  
21 writer magazine books on my desk, and it was an

22 agent from Erie, Pennsylvania. You know, there are  
23 no author's agents from Erie, Pennsylvania, so I

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93

1 wrote this lady a letter.

2 It turned out she had cancer, and she  
3 liked the idea, so then my agent became my  
4 advocate, and she hustled the book, and then I got  
5 a contract from Plenum, and it took me about a year  
6 and a half to get a contract, and I don't -- I got  
7 26 or 27 rejections, and Plenum decided they liked  
8 the book, and it was because of my agent that I  
9 think I got a contract, and then from the years '91  
10 to '93, I wrote it, or '94, I wrote it.

11 It came out in '94, and I was kind of  
12 enthused about it, and I went on an author's tour,  
13 and I was on Jim Bohannon's show, so I was kind of  
14 excited, and then [DELETED],  
15 and I have not paid much attention to this book  
16 since then, and I think it is out of print.

17 I think it was noble, something I did.

18 I didn't make any money out of it.

19 I thought it was going to help my  
20 practice. It probably didn't do that, but I wanted  
21 to do that.

22 Q How is [DELETED]?

23 A [DELETED]

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94

1 [DELETED], but I, you

2 know, after [DELETED], I quit hustling the  
3 book.

4 I have gone back to practicing.

5 Well, I never got away from practicing,  
6 and I would never write another book. It's too  
7 much work.

8 Q I would like to get a copy of that book  
9 from you, if I can.

10 MR. McLAUGHLIN: You have to buy one.

11 THE WITNESS: Those are tough.

12 MR. SMITH: Well, I think that's a whole  
13 issue that we have had, but I think -- I think the  
14 book may be out of print, based on what I just  
15 heard.

16 A If you can't get a copy, I can get you a  
17 copy, I believe.

18 Q Okay. I would appreciate it. You wrote  
19 a -- I need help on what it was precisely, but it  
20 is titled "Knowledge Therapy, Understanding Cancer  
21 is Vital to Treatment?"

22 A "How to Care for Today and Tomorrow."

23 Q Oh, I'm sorry. But you wrote something

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95

1 in the Pittsburgh Post Gazette following that?

2 A Well, let me look at it. I've got it.  
3 I've got it. Hold on.

4 Q Yes, sir.

5 A Oh, yes. It's before [DELETED]

6 I would write articles.

7 Q Sort of a guest writer?

8 A Yes. You would get -- you know, after  
9 you do something here local, you get solicited.

10 Q Sure. And you did one for them on focus  
11 of lung cancer, also?

12 A No. That was that support, national



13 support magazine.

14 Q Okay.

15 A That was about lung cancer. As long as  
16 you don't tell anybody, I lifted paragraphs out of  
17 my book.

18 Q Okay.

19 A You know, I don't want to get into  
20 plagiarism problems.

21 Q But you put -- was the book called --  
22 the publication, that was called "Coping, Living  
23 With Cancer"?

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96

1 Am I catching up with you?

2 A Yes. That's a magazine that is  
3 published for cancer survivors.

4 Q Okay. And this was an article you wrote  
5 for them?

6 A Yes. I don't have a copy of it. I  
7 believe -- I am almost certain that everything in  
8 that article is in the book --

9 Q Okay.

10 A -- or close to it.

11 Q You had written three earlier pieces  
12 regarding breast cancer as well? Is that correct?

13 A Yes, sir. They were more -- they were  
14 scientific articles.

15 Q Okay. You -- and I guess before we  
16 started off in that direction, we were on page  
17 three, paragraph three of your opinions?

18 A Yes, we were.

19 Q And I think we were -- I am not sure

20 that this is precisely true, but I think it is. We  
21 were in that first sentence of number three, and  
22 you had indicated that Dave Tompkin had two  
23 significant risk factors, or at least the most

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97

1 important of his risk factors were asbestos  
2 exposure and his family history of cancer? Is that  
3 correct?

4 A Yes, sir.

5 Q Could you flesh out the reason you say  
6 the asbestos exposure?

7 A Well --

8 Q You mentioned that you see --

9 A Well, in the paragraph I wrote "other  
10 risk factors," right.

11 Q Yes, sir, and then these were the two.

12 A And then the most important would be  
13 asbestos and history of family.

14 Q Yes, sir.

15 A Yes, sir.

16 Q And if you could flesh out the exposure  
17 to asbestos part of that, please?

18 MR. KEMNA: Objection. Form.

19 THE WITNESS: What do I do? Answer?

20 MR. McLAUGHLIN: Answer.

21 MR. KEMNA: If you understand the  
22 question.

23 A My understanding is, asbestos is an

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98

1 associated and accepted risk factor for lung  
2 cancer.

3 Q And you base that upon what?

4           A       Well, that was where we got off the  
5       topic.

6 Q Yes, sir. That may well be. We got off  
7 on this sentence, I know.

8           A       Yes. I think from reading in the  
9       medical texts and my clinical experience and --

10            0        And it is --

11           A       -- and some of the research --

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12      0      -- including --

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13           A       -- including the research I did for the  
14    book.

15 Q Can you tell me about that, the research  
16 that you did?

17                   Is there anything about it that you can  
18    think of specifically, either that, or your general  
19    reading in medicine?

20 MR. KEMNA: Objection.

21           A       Well, I just would go and read  
22   definitive texts.

23 Q And you remember reading that asbestos

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1 was a risk factor for lung cancer?

2           A       I believe I do.

3 Q And you mentioned the family history of  
4 cancer. Can you tell us about that feature's role,  
5 please?

6 MR. KEMNA: Objection.

7           A       You know, in all standard history, they  
8       take a standard history of family history.

9                    0        Yes, sir.

10           A       It is generally considered to be

11 standard in all history and physicals, and in lung  
12 cancer, it is a risk factor in -- I think in the  
13 medical literature.

14 It is not -- I don't think it is the --  
15 the strength of the risk factor is asbestos, but it  
16 is a -- there's literature out there that say that  
17 the family history is an independent risk factor.

18 Q Are there any other risk factors that  
19 come to mind in that first sentence?

20 Are those the two, or are there any  
21 others that come to mind?

22 MR. KEMNA: Objection. Form.

23 A I mean, I could pull my book out.

HESS and SMITH - (412) 261-5799

100

1 There's a whole paragraph of stuff. I would not --

2 Q No. I mean risk factors regarding Dave  
3 Tompkin specifically, any.

4 A Well, I mean, there is a debate on  
5 whether alcohol abuse is a risk factor. Some --

6 Q Where do you come down on that?

7 A It is a higher risk factor for head and  
8 neck cancer.

9 Q Okay. But as far as lung cancer goes?

10 A I think it is controversial.

11 Q Do you have an opinion one way or the  
12 other?

13 A I think if it -- in that if it is a  
14 marker for poor nutrition, then it is a risk  
15 factor, people with bad nutrition and debility,  
16 like many people that drink, but I don't think it  
17 is a -- it is a controversial risk factor, in my  
18 opinion. It may be --

19 Q If I --

20 A -- depending on the context.

21 Q If I am hearing you right, and I want  
22 you to correct me if I am wrong, but I want to try  
23 to say it simplistically, as saying that in your

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101

1 view, that if someone's drinking caused them to get  
2 poor nutrition, and then they became debilitated,  
3 that from that sense, it would be a risk factor for  
4 lung cancer?

5 A Yes.

6 MR. McLAUGHLIN: Objection to form.

7 BY MR. SMITH:

8 Q Does that sound right?

9 A And then there is other literature. I  
10 mean, some folks have written it, and it is a  
11 minority view in the literature, I believe, but  
12 there are some articles that think -- I don't think  
13 I can say with certainty that alcohol is a big risk  
14 factor for lung cancer.

15 Q Okay. You mentioned the elevated level  
16 of asbestos fibers in Dave Tompkin's lungs? Is  
17 that correct?

18 A Yes, sir.

19 Q And do you consider that to be very  
20 significant?

21 A Well, I think it is operative in this  
22 case.

23 Q Because it shows he had asbestos in his

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102

1 system?

2           A       I think it showed he had an asbestos  
3       exposure, occupationally and pathologically.

4 Q And then in the last sentence, tell me  
5 what you are saying there, if you would.

6 MR. KEMNA: Objection. Objection to  
7 form.

8           A       Do you want me to --

9 Q I can read it, but can you put that  
10 in --

11                    A            Well --

12 Q -- lay terms? Can you lay out what you  
13 are saying there --

14 MR. KEMNA: Objection to form.

15 Q -- or can you not?

16 MR. KEMNA: The same objection.

17           A       You know, I think it is pretty straight  
18   forward.

19           It's hard to be certain when there are  
20   other known accepted factors for lung cancer.

21 Q And that's from your perspective?

22           A       Well, I think it's from -- I think it's  
23       a common sense perspective. I --

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103

1 Q Let me ask this. There's ones we have

2 spoken of. The asbestos is a risk factor, in your

3 view?

4 A Yes.

5                    Q            Right, sir?

6           A       Yes, sir.

7 Q And Dr. Sherry, the family history is a  
8 risk factor, in your view?

9           A       Yes, sir.

10 Q And I believe, and I want you to correct  
11 me if I am wrong -- or I am going to withdraw that.

12 Do you think that his smoking was a risk  
13 factor?

14 A Yes, sir.

15 Q Would it be your opinion that those  
16 three items would be, in your opinion, the three  
17 strongest risk factors for his lung cancer? And by  
18 "those three," I mean the asbestos, the family  
19 history, and the smoking.

20 A I think they are accepted risk factors  
21 --

22 Q But in your --

23 A -- in patients.

HESS and SMITH - (412) 261-5799

104

1 Q -- judgement, if we were going to carve  
2 out what you thought were the three most likely  
3 candidates, would those be the three?

4 MR. KEMNA: Objection to form.

5 A Well, I think they are three that -- you  
6 know, there may be other ones that, you know,  
7 nobody knows about.

8 Q Yes, sir. But of the ones that you are  
9 aware of, and, you know, change the -- put anything  
10 else in there, if you would rather, but I just want  
11 to know -- I want to know where you are coming  
12 from, but of the ones that you are aware of, would  
13 those be the three strongest candidates?

14 A I would --

15 MR. KEMNA: Objection to form.

16 A I think that they would be the three

17 most obvious.

18 I don't know if strongest, but they are

19 the most obvious.

20 Q Is there any other that you think of,

21 that you can think of that would be stronger than

22 one of those three, or more likely?

23 A Well, I mean, there are other exposures

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105

1 that weren't in the case, so I don't think so.

2 Q Okay.

3 A You know, uranium; if he had a uranium

4 exposure that we don't know about.

5 Q Sure. But you are not aware of him

6 being in a uranium situation is my belief?

7 A Yes, I believe that.

8 Q Okay. Let me ask you this question from

9 you: Is it possible, in your mind, that all three,

10 or any combination thereof, were causes of his lung

11 cancer?

12 MR. KEMNA: Objection.

13 MR. McLAUGHLIN: Objection.

14 A I think there are three risk factors.

15 Q And based on -- and when you say "risk

16 factor," you mean what, Dr. Sherry?

17 A Well, you have got to draw a distinction

18 between risk and cause --

19 Q Yes, sir. Go ahead. I will --

20 A -- and causality is -- if it was were a

21 cause, everybody who smoked would have lung cancer.

22 Q If that were a cause --

23 A It mean, if there is cause and effect,

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1 so you can't talk about, really, cause, because  
2 everybody who smokes doesn't get lung cancer, so  
3 you have to talk about probability and risk --

4 Q Okay.

5 A -- and that implies to me associations,  
6 rather than causes.

7 Q Let me see if -- okay. I understand  
8 how you are using the term "cause," but the -- we  
9 know that he had -- or withdraw that.

10 Is it your opinion that he did have  
11 adenocarcinoma, based upon what you read?

12 A Well, that is another explanation, you  
13 know.

14 Five percent of all adenocarcinomatous  
15 lungs have no exposures --

16 Q Yes, sir.

17 A -- so that would be the fourth  
18 explanation of reality, you know, when you are  
19 saying other things that could be germane.

20 Q Okay.

21 A You know, I mean, I know that's -- but  
22 that happens.

23 The literature says it happens in five  
HESS and SMITH - (412) 261-5799

1 to ten percent, so I just -- that just came to my  
2 mind when we were talking, sir.

3 Q Fair enough. But is it your opinion  
4 that he had adenocarcinoma?

5 A Yes.

6 Q And if I am hearing you, you are saying  
7 that there comes to mind, to your mind at this

8 moment in time, four risk factors?

9 A Well, four possible associations.

10 Q And when you are using the word

11 "association," you are meaning that to say what?

12 MR. KEMNA: Objection to form.

13 A Four possible reasons or events that

14 occur in patients, I mean --

15 Q Okay.

16 A -- to draw the distinction between risk

17 and cause, because that's -- you know, that's, I

18 think, key here.

19 Q And those would be the four risks that

20 come to your mind regarding Dave Tompkin, as I hear

21 you?

22 A Yes.

23 Q Is that fair?

HESS and SMITH - (412) 261-5799

108

1 A Yes.

2 Q And as to -- and as far as going beyond

3 that, are you able to?

4 A I mean --

5 MR. KEMNA: Objection to form.

6 MR. McLAUGHLIN: Objection.

7 A I mean, I don't know. You know, I mean,

8 if you want to ask me more -- I don't know what

9 you are saying.

10 MR. McLAUGHLIN: I don't think that's a

11 proper question.

12 BY MR. SMITH:

13 Q I guess my question would be that, are

14 you saying to me that in your view, those four

15 items that you have just listed, asbestos, family

16 history, smoking, or these other five percent other  
17 factors were all, in your judgment, risk factors  
18 that may have been reasons for Dave Tompkin's lung  
19 cancer?

20 MR. KEMNA: Objection.

21 BY MR. SMITH:

22 Q Is that an honest statement?

23 A I think I would say they were -- they

HESS and SMITH - (412) 261-5799

109

1 exist in his case.

2 Q Okay. Did I say it accurately, though?

3 Did I say what you were telling me accurately?

4 MR. KEMNA: Objection to form.

5 MR. McLAUGHLIN: No. That is not what

6 the doctor testified to.

7 BY MR. SMITH:

8 Q Correct me if I am wrong. I really

9 would like you to.

10 I do want to understand what you are

11 saying when we are done, though.

12 MR. McLAUGHLIN: Objection. Ask a

13 proper question.

14 He is not here to correct you, Russ.

15 MR. SMITH: That is my question, Pat.

16 He is not here to ask the questions, either.

17 I am just asking -- that is a fair

18 question, and I would like the court reporter

19 to read it back.

20 MR. McLAUGHLIN: I am not asking a

21 question. I am making a objection.

22 MR. SMITH: This is not your deposition,

23 Pat.  
HESS and SMITH - (412) 261-5799 110  
1 MR. McLAUGHLIN: I am making an  
2 objection.  
3 MR. SMITH: I heard it.  
4 (Discussion off the record.)  
5 (Record read.)  
6 MR. McLAUGHLIN: You may have to go  
7 back.  
8 BY MR. SMITH:  
9 Q That's all I want to know, and I don't  
10 care. You can correct it any way you want, really,  
11 but I --  
12 MR. KEMNA: Well --  
13 MR. McLAUGHLIN: Let's read again what  
14 you said.  
15 MR. SMITH: Let's let the witness ask,  
16 Pat.  
17 MR. KEMNA: Russ, I think the  
18 problem --  
19 MR. SMITH: That's my question to the  
20 witness. The witness can answer that.  
21 He doesn't have to have you folks  
22 instructing me.  
23 MR. KEMNA: Well, the problem is that  
HESS and SMITH - (412) 261-5799 111  
1 the question that was just read by the court  
2 reporter is vague unless you know what it was  
3 relating back to.  
4 BY MR. SMITH:  
5 Q Look, answer their question.  
6 MR. SMITH: Pat, ask him a question.

7 MR. McLAUGHLIN: I don't have a question  
8 to put to the witness.

9 MR. KEMNA: Pat never asked a question.  
10 I haven't asked a question.

11 We are asking you to clarify your  
12 question to the witness

13 BY MR. SMITH:

14 Q Do you understand my question, Dr.  
15 Sherry? Just tell me if you do, or you don't.

16 A I thought you asked me what risk factors  
17 or explanations, I mean, if I can use the word  
18 "explanations" --

19 Q That's fine. That's just --

20 A -- possible explanations or operative  
21 circumstances --

22 Q Yes, sir.

23 A -- kind of facts of his case --

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112

1 Q Pardon?

2 A -- why Mr. Tompkin would get lung  
3 cancer --

4 Q Yes, sir.

5 A -- and they would include family  
6 history, and not in any order --

7 Q Yes, sir. I understand.

8 A -- smoking exposure, asbestos exposure,  
9 family history exposure, with the proviso that five  
10 to ten percent of all lung cancers have no -- have  
11 no -- neither -- no well-recognized exposure or  
12 risk factors, which would be the fourth, which  
13 really isn't a risk factor.

14                   You know, the fourth one isn't a risk  
15 factor. It is a statement of reality or of  
16 scientific fact.

17           Q       Fair enough. Let's go to item four of  
18 your opinions, please.

19                   I take it you talked earlier about the  
20 fact that a person -- you know, you referred to the  
21 fact that adenocarcinoma could occur in non-smokers  
22 as well as smokers? Is that correct?

23           A       I believe so.

                  HESS and SMITH - (412) 261-5799

113

1           Q       And do you recall any specific medical  
2 literature that you are thinking of when you make  
3 that statement?

4           A       It is a statement in my book. It is  
5 pretty well -- I think it is pretty well accepted.

6                   I remember hearing it as early as the  
7 early '80s.

8           Q       And we have talked about -- we talked  
9 about that issue earlier, I believe --

10          A       Yes, sir.

11          Q       -- that adenocarcinoma with non-smokers  
12 could include -- or withdraw that.

13                   I think I had asked you the question in  
14 general about your cancer patients. You have  
15 already covered that, so I will withdraw my  
16 question.

17                   In the second sentence, you indicate, as  
18 I read it, that Dr. -- I mean, that Dave Tompkin's  
19 lung tumor was not typical of the adenocarcinomas  
20 that you had treated.

21                   Can you tell me why you say that,

22 please?

23 A Because he lived three years and --

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114

1 Q After diagnosis?

2 A Yes, I mean, and it is just a clinical  
3 point. It was an unusual clinical behavior.

4 Q Let me ask this question, though, just  
5 so that I do follow you.

6 You are not saying that has any bearing  
7 on whether or not his smoking involved his lung  
8 cancer?

9 You are just making that observation as  
10 a distinction between adenocarcinomas that you have  
11 treated? Is that true, or is that --

12 A Well, it --

13 MR. KEMNA: Objection. Form.

14 A Well, I think the sentence says it was  
15 not typical of the adenocarcinomas of the lungs I  
16 have treated.

17 Q Yes, sir. But is there any relevance to  
18 this case in your saying that, that you can think  
19 of?

20 MR. KEMNA: Objection.

21 A I think Mr. Tompkin's survival was  
22 unusual.

23 Generally, lung cancers are much more

HESS and SMITH - (412) 261-5799

115

1 aggressive than his, and it was a little bit -- it  
2 was just a clinical observation.

3 Q But you can't -- I mean, I guess what I  
4 am trying to understand, if there is something

5 behind the woodwork that I am not seeing here, sir.

6 That has no bearing on this case as far  
7 as what is before the Court, as far as what you  
8 know, does it, or doesn't it?

9 MR. KEMNA: Objection.

10 A Well, I mean, in the sense that it was  
11 an unusual clinical course that was not typical of  
12 the lung cancers I have treated in the past.

13 Q Have you talked about that issue with  
14 anybody else in this case, it not being typical?

15 A Like who, sir?

16 Q Any of the attorneys or any --

17 A Well, that point, I met with Mr.  
18 O'Neill about three years ago, and he took it in  
19 his notes, and when he called me a couple months  
20 -- I guess he called me six weeks ago --

21 Q Yes, sir.

22 A -- and we went over all the things I  
23 told him three years ago, and that was one of the

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116

1 points I made three years ago, and I remember  
2 making it after we went over everything, but the  
3 original observation was mine --

4 Q Does that --

5 A -- and in that perspective, I made it in  
6 the context that it was unusual, and in these cases  
7 that we review, they like to have a fairly complete  
8 view of the typicality and atypicality of  
9 malignancies based on my experience, so it was my  
10 observation three years ago.

11 Mr. O'Neill reminded me.

12 Q Okay. So that's a question they asked



13       you?

14           A       But the original observation, once he  
15       mentioned it, I remembered mentioning it to him,  
16       you know, three years later.

17           Q       I understand. To your -- to the best  
18       of your knowledge, does that atypicality have any  
19       medical significance?

20                   MR. KEMNA: Objection.

21           A       Well, earlier in the record there was a  
22       reference in that black little folder of adeno of  
23       unknown primary --

                  HESS and SMITH - (412) 261-5799

117

1           Q       Okay.

2           A       -- and, you know, if you had told me he  
3       had an adeno of unknown primary, it would have --  
4       you know, those are unusual malignancies, and in  
5       that sense, I thought it was germane, and it is  
6       unusual this guy, this poor patient lived three  
7       years with lung cancer.

8           Q       And this is adeno of unknown primary  
9       that you are referring? Is that correct?

10                   MR. KEMNA: Objection.

11           A       Well, that's the context I remember  
12       making in my original discussion three years ago  
13       with Mr. O'Neill.

14           Q       But those are distinguished from  
15       adenocarcinomas?

16           A       Of the lung.

17           Q       Pardon?

18           A       Yes.

19           Q       And do you know whether or not those are

20 caused by smoking, or can be?

21 A They are not.

22 Q But it is your view that this is in fact  
23 an adenocarcinoma? Is that correct?

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118

1 A Yes. It was an indolent adenocarcinoma  
2 of the lung, and it was atypical, because it grew  
3 so slow.

4 Q Okay. Have we covered your opinions and  
5 their bases to the best of your knowledge and  
6 belief?

7 MR. KEMNA: Objection.

8 A I mean, I don't have anything more to  
9 say if you don't have anything more to ask.

10 Q No. The only thing I have to say is, I  
11 tried to go through your report, and I wanted to  
12 make sure that I didn't want to have any surprises  
13 later on.

14 I just wanted to make sure, that you are  
15 welcome to look back through it.

16 I just want to know if I covered -- I  
17 thought we attempted to, but if we covered -- have  
18 we covered your opinions and their reasons and  
19 bases and facts and information upon which they are  
20 based and which support them?

21 MR. KEMNA: Objection. I mean, Russ,  
22 you have asked a series of questions.

23 It is up to you to explore the detail of

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119

1 Dr. Sherry's opinions.

2 MR. SMITH: I object to the speaking  
3 objection, but that's okay. That's fine.

4                   That's fine as an objection. I'm sorry.

5       BY MR. SMITH:

6           Q       All right. Dr. Sherry, your answer to  
7       my question would be what?

8           A       Well, I think my report is pretty  
9       straight forward, and I think we covered it.

10          Q       Okay. That's all I wanted to know. In  
11       your experience, what has been the normal length of  
12       survival in adenocarcinomas after diagnosed?

13          A       18 months.

14          Q       Okay.

15          A       At III-B, 18 months, Stage, you know,  
16       III, it's 18 months --

17          Q       And?

18          A       -- Stage III.

19          Q       If they are diagnosed at a Stage III  
20       situation?

21          A       Uh-huh, yes, sir.

22          Q       Are they ever diagnosed at earlier  
23       stages?

                  HESS and SMITH - (412) 261-5799

120

1           A       Yes, sir.

2           Q       So earlier stages might go longer, but  
3       if they are in a Stage III --

4           A       It is unusual.

5           Q       -- it would be about 18 months?

6           A       Yes, sir.

7                   MR. SMITH: Objection.

8                   MR. McLAUGHLIN: Objection.

9       BY MR. SMITH:

10          Q       Are you making that statement in the

11 combination of your experience, and what you have  
12 read?

13 A I think that's a fair number from the  
14 literature.

15 Q Okay. Any literature that comes to mind  
16 that supports that?

17 A Probably those textbooks. It's probably  
18 in a lot of spots. I bet you it's in my book.

19 Q Okay.

20 A Hold on. Maybe not.

21 I say in the book, Stage III, only 15  
22 percent survive longer than five years.

23 MR. McLAUGHLIN: What page?

HESS and SMITH - (412) 261-5799

121

1 Q So that would mean --

2 THE WITNESS: Page 34.

3 BY MR. SMITH:

4 Q -- most people would die before that  
5 time, then, obviously?

6 A The average survival is a year and a  
7 half.

8 Q Do you ever render opinions as to the  
9 cause of lung cancer in a non-legal setting?

10 MR. McLAUGHLIN: Objection.

11 A I tell people that, you know, that lungs  
12 -- smoking is a risk factor for lung cancer.

13 I advise my patients to quit smoking.

14 Q Yes, sir. But most people that you  
15 treat, that you would diagnose their condition as  
16 lung cancer, does the diagnosis ever say, "Lung  
17 cancer caused by smoking," or "Lung cancer caused  
18 by" --

19 A I don't --  
20 Q -- anything --  
21 MR. SMITH: Objection.  
22 Q -- or does it just say --  
23 A I don't remember saying that. I advise  
HESS and SMITH - (412) 261-5799 122  
1 them it is a risk factor.  
2 Q Okay. And you diagnose what their  
3 condition is --  
4 A Yes, sir.  
5 Q -- for those that get lung cancer? I am  
6 guessing -- let me -- the first case that you  
7 ever did for Shook, Hardy & Bacon, what was the  
8 medical condition?  
9 MR. KEMNA: Objection.  
10 MR. SMITH: Was that one of -- okay.  
11 That was one of -- okay. That was one of  
12 those that was confidential as well?  
13 That was when you had him as a  
14 confidential witness? Is that correct?  
15 MR. KEMNA: Well, let's just clarify,  
16 Russ.  
17 MR. SMITH: Yes.  
18 MR. KEMNA: It is clear on the record  
19 that Dr. Sherry has only been listed and is  
20 now is testifying in one case where he would  
21 not have been considered a confidential expert  
22 in the case.  
23 (Whereupon, Dr. Sherry left the room.)  
HESS and SMITH - (412) 261-5799 123  
1 MR. KEMNA: All prior cases to this one,

2 he has described as those where he was not  
3 listed, and let me add, Russ, that Dr. Sherry  
4 has now had to leave the room to make a call  
5 for a page --

6 MR. McLAUGHLIN: An emergency page.

7 MR. KEMNA: -- that he has been given.

8 MR. SMITH: Sure. We will take a short  
9 break, then.

10 MR. McLAUGHLIN: Yes. He has got an  
11 emergency call.

12 MR. SMITH: Okay. Unless you want to  
13 make something further on the record. I am  
14 not trying to shortcircuit you.

15 MR. KEMNA: No. I think that's clear.

16 MR. SMITH: Thank you. We will be back  
17 in a couple of minutes, I hope?

18 MR. McLAUGHLIN: Yes. Hopefully five.

19 MR. KEMNA: All right. Five minutes.

20 (Recess taken.)

21 BY MR. SMITH:

22 Q Dr. Sherry --

23 A Yes, sir?

HESS and SMITH - (412) 261-5799

124

1 Q -- I have one last question for you.

2 You were talking about Rosie earlier --  
3 do you remember -- that announcer?

4 A Rosie Rosewell, yes.

5 Q Yes. Do you remember the old dippy  
6 doodle?

7 A I do not. You know, you are a little  
8 older than me, because I think he got out of it in  
9 the late '50s.

10 Q Oh, I couldn't be that old.

11 A Bob Prince became the voice in '58.

12 Q Yes, he did, but that was another one.

13 I am older than you.

14 A "Kiss it goodbye" was Bob Prince.

15 Q That's all the questions I have.

16 A Thank you.

17 Q Thank you.

18 MR. KEMNA: Thanks, Russ.

19 MR. SMITH: Signature? Does Dr. Sherry

20 want to read it?

21 MR. KEMNA: He will sign.

22 MR. SMITH: Okay. Good luck with your

23 daughter.

HESSE and SMITH - (412) 261-5799

125

1 THE WITNESS: Thank you, sir. Thanks.

2 (Discussion off the record.)

3 MR. SMITH: I do have one request on the

4 record, Mary Ellen.

5 I would like you to get the copies of

6 the exhibits marked, with the exception of the

7 ones that were constructively marked, but I

8 would like Dr. Sherry to please hold onto

9 those, because we may not be able to do it,

10 but we may be asking for parts of those, and I

11 do believe that with respect to Dr. Sherry's

12 book as well, but at any rate, if he would

13 please hang onto those, and the rest, if you

14 would, those marked exhibits, if you would

15 take them with you.

16 MR. KEMNA: Russ --

17 MR. SMITH: Yes, sir?

18 MR. KEMNA: -- just for clarification,

19 we did have two folders marked that contained

20 those x-rays.

21 Those are not something that we are

22 going to give to the court reporter.

23 We have made it clear on the record the

HESS and SMITH - (412) 261-5799

126

1 identification of those x-rays.

2 MR. SMITH: Dr. Sherry can take custody

3 of those, also.

4 MR. KEMNA: Well, we actually, at Shook,

5 Hardy, will maintain custody of those copies

6 of the x-rays.

7 MR. SMITH: You guys put down the ground

8 rules -- I can see that -- and your ground

9 rules, you are willing to maintain them so

10 that we can have them as needed?

11 MR. KEMNA: Well, we have identified

12 them. We have identified them clearly on the

13 record, Russ.

14 MR. SMITH: I am not critical of you,

15 but my question is, respectfully, if we should

16 for some reason need them, you would be

17 respectfully willing to provide them?

18 MR. KEMNA: If you otherwise don't have

19 those copies in your possession, which I would

20 hope that you would have since the outset, but

21 if you don't, we will come to some arrangement

22 to make sure that you have a complete

23 collection.

HESS and SMITH - (412) 261-5799



1 MR. SMITH: Okay. We will see you all.

2 MR. KEMNA: All right. See you, Russ.

3 - - -

4 (Whereupon, at 6:37 o'clock PM, the  
5 deposition was concluded.)  
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2 C E R T I F I C A T E

3 COMMONWEALTH OF PENNSYLVANIA )  
4 ) SS:  
5 COUNTY OF ALLEGHENY )

6 I, Mary Ellen Wolf, a Notary Public for the  
7 Commonwealth of Pennsylvania, do hereby certify:

That the witness named in the deposition,  
prior to being examined, was by me first duly  
sworn;

8

9           That said deposition was taken before me at  
10 the time and place therein set forth and was  
11 taken down by me in stenotypy and thereafter  
12 transcribed by me via computer;

13           That said deposition is a true record of the  
14 testimony given by the witness and of all  
15 objections made at the time of the examination.

16           I further certify that I am neither counsel  
17 for nor related to any party to said action, nor  
18 in any way interested in the outcome thereof.

19           IN WITNESS WHEREOF, I have subscribed my name  
20 and affixed my seal this \_\_\_\_\_ day of  
21 \_\_\_\_\_, 2001.

22           THE ABOVE CERTIFICATION DOES NOT APPLY TO  
23 REPRODUCED TRANSCRIPT COPIES, UNLESS UNDER THE  
24 DIRECT SUPERVISION OF THIS REPORTER.

25

26           \_\_\_\_\_  
27 Mary Ellen Wolf  
28 Notary Public in and for the  
29 Commonwealth of Pennsylvania  
30 My Commission expires March 31, 2004

31

32

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129

1   IN RE: TOMPKIN vs. THE AMERICAN TOBACCO COMPANIES,  
2       et al.

3

4           I, DR. MICHAEL SHERRY, do hereby certify  
5 that the foregoing is a true and correct  
6 transcription of my testimony in the above-entitled  
7 matter.

8

9

10

11           \_\_\_\_\_  
12 MICHAEL SHERRY, M. D.

13

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19

Subscribed and sworn to before me on

16 this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

17

18

\_\_\_\_\_  
Notary Public

19

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23

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130

1 CORRECTIONS TO THE DEPOSITION OF MICHAEL SHERRY  
TAKEN THURSDAY, JUNE 28, 2001

2

3 PAGE LINE CORRECTION

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